80-1576

Office-Supreme Court, U.S.
FILED
MAR 17 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,

Appellants,

—against—

CHRIS SCHMID,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

NICHOLAS deB. KATZENBACH
Counsel of Record
THOMAS H. WRIGHT, JR.
Princeton University
318 Nassau Hall
Princeton, New Jersey 08544
(609) 452-5560
Attorneys for Appellants
~~*Princeton University*~~

Of Counsel:
MICHAEL A. CANDIDO, JR.
MARGARET B. G. FREIBERG
Old Orchard Road
Armonk, New York 10504
(914) 765-1900

March 17, 1981.

QUESTION PRESENTED

Whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	*i*
TABLE OF CONTENTS	*ii*
TABLE OF AUTHORITIES	*iii*
DECISIONS OF THE COURTS BELOW	1
JURISDICTIONAL BASIS OF THIS APPEAL	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
Statement of Facts	3
The Proceedings Below	5
THE QUESTION PRESENTED IS SUBSTANTIAL	6
I. IN CONTRAVENTION OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS, THE DECISION BELOW DENIES THE FREEDOM OF PRINCETON UNIVERSITY AND OTHER PRIVATE INSTITUTIONS TO PURSUE ACADEMIC OBJECTIVES WITHOUT STATE INTERFERENCE	6
II. THE DECISION BELOW DISCOURAGES ALL PRIVATE UNIVERSITIES AND OTHER INSTITUTIONS IN NEW JERSEY FROM USING PROPERTY OWNED BY THEM TO EDUCATE OR PERSUADE MEMBERS OF THE GENERAL PUBLIC TO PARTICULAR VIEWPOINTS	10
III. THE DECISION BELOW MISUNDERSTANDS THIS COURT'S DECISION IN *PruneYard* AND, IF ALLOWED TO STAND, COULD ENCOURAGE OTHER STATES WITH CONSTITUTIONAL PROVISIONS SIMILAR TO THOSE OF NEW JERSEY TO ARRIVE AT SIMILAR CONCLUSIONS	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

Cases

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) 10, 11

Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976) 10, 11

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) 11

Marsh v. Alabama, 326 U.S. 501 (1946) 10

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 8, 13, 14

Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) 10

PruneYard Shopping Center v. Robins, ____ U.S. ____, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980) ..... *passim*

Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) 11, 15

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 8

University of California Regents v. Bakke, 438 U.S. 265 (1978) 7

Constitutions, Statutes and Court Rules

U.S. Const., First Amendment ..... *passim*

U.S. Const., Fifth Amendment ..... *passim*

U.S. Const., Fourteenth Amendment ..... *passim*

28 U.S.C. § 1257(2) 2

N. J. Const., art. I, para. 6 ..... 3, 5

N. J. Const., art. I, para. 18 ..... 3, 5

N. J. Statutes Annotated:

2A:170-31 (1971) 3, 4

2C:18-3 (1980) 4

Rules Governing the Courts of the State of New Jersey, Rule 7:4-4(b) 5

Other Authorities

Note, *Private Abridgment of Speech and the State Constitutions*, 90 Yale L. J. 165 (1980) 15

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,

Appellants,

—against—

CHRIS SCHMID,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

DECISIONS OF THE COURTS BELOW

The decision of the Supreme Court of New Jersey, dated November 25, 1980, is reported at 84 N.J. 535, 423 A.2d 615, and is reprinted in the Appendix ("App.") at pages 1a-47a. The Order of the Superior Court of New Jersey, Law Division—Criminal, dated February 20, 1979, appears in the Appendix at page 48a. It has not been published. The opinion of the Municipal Court of the Borough of Princeton, dated October 30, 1978, has not been published. It appears in the Appendix at pages 49a-69a.

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from a final judgment of the Supreme Court of New Jersey reversing a trespass conviction of appellee. That court held that, under the circumstances of the case, certain provisions of the New Jersey Constitution obligated Princeton University ("Princeton") to let appellee distribute political literature and solicit money on Princeton's campus. Relying on this Court's recent decision in *Prune Yard Shopping Center v. Robins*, ___ U.S. ___, 64 L. Ed.2d 741, 100 S.Ct. 2035 (1980)—which was decided *after* this case was briefed and argued in the Supreme Court of New Jersey—the court below further held that New Jersey's constitutional provisions, as applied, did not offend the U.S. Constitution. In its brief and its oral argument to the state supreme court, Princeton had drawn into question the validity of those provisions as applied to a private university on the ground of their repugnance to the U.S. Constitution.

The decision of the Supreme Court of New Jersey was issued November 25, 1980. A petition for rehearing was timely filed on December 5, 1980, and was denied December 19, 1980. (App. 70a). The Notice of Appeal was filed on March 10, 1980. (App. 71a). This Court has jurisdiction of the appeal by virtue of 28 U.S.C. § 1257(2). *See Prune Yard Shopping Center v. Robins, supra* at 64 L.Ed.2d 751.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment, United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Article I, para. 6, New Jersey Constitution:

> "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . . ."

Article I, para. 18, New Jersey Constitution:

> "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances."

New Jersey Statutes Annotated 2A:170-31 (1971):

> "Any person who trespasses on any lands . . . after being forbidden so to trespass by the owner, occupant, lessee or licensee thereof . . . is a disorderly person and shall be punished by a fine of not more than $50."

STATEMENT OF THE CASE

Statement of Facts

The facts in this case were stipulated by the parties.

On April 5, 1978, the appellee was arrested while distributing political literature and soliciting purchases of such

literature on the campus of Princeton University. (App. 1a, 49a). He was subsequently prosecuted for trespassing. (*Id.*)

Princeton is a private, not-for-profit educational institution. (*Id.*) Its stated purposes include "the teaching and general development of students" and "the transmission of knowledge and learning to society-at-large." (App. 28a).

Princeton has regulations which set forth the extent to which the public may use its campus and facilities. Under the regulations in effect in 1978, the public enjoyed a blanket invitation to stroll on Princeton's walkways and grounds and to attend lectures, cultural performances, and other events designated as open to the public. (App. 29a). Princeton did not, however, issue an equally broad invitiation for the public to solicit, advertise, campaign, or otherwise hold forth on University property. The regulations provided that persons and groups not affiliated with Princeton could distribute literature and solicit purchases or donations on the campus only if they first sought and received the express permission of a specified University official. (App. 49a-50a). The policy was to deny such permission unless the person or group applying was invited or sponsored by a Princeton-affiliated person or group. (*See* App. 2a, 32a, 50a).

Appellee was unaffiliated with Princeton University. (App. 1a). He was aware of the requirement that non-members of the University obtain permission before soliciting on University property; he had been told of this policy on February 15, 1978, when he had been specifically forbidden to enter the campus to solicit without first obtaining permission. (App. 3a-4a, 50a). Nonetheless, he did not seek permission to distribute literature and solicit purchases on April 5, 1978. (App. 2a, 50a). When he was found soliciting on campus on that date—uninvited, unsponsored, and unauthorized—he was arrested and subsequently charged with violating New Jersey's general trespass statute, N.J.S.A. 2A:170-31 (1971)[1]. (App. 4a, 49a).

[1] This statute was superseded in 1979 by N.J.S.A. 2C:18-3 (1980).

The Proceedings Below

Defendant was tried for trespass in Princeton Borough Municipal Court on October 20, 1978. As authorized by a New Jersey rule of court,[2] the trial was prosecuted by counsel for Princeton University on behalf of the State of New Jersey. Defendant asserted that he was *entitled* by the federal and state constitutions to conduct political leafleting and solicitation on Princeton University's property. The prosecution contended not only that the defendant had no such right, but also that Princeton's rights under the Fifth and Fourteenth Amendments *precluded* the federal and state governments from compelling Princeton to grant such access. The municipal court held that neither the U.S. Constitution nor state law diminished the right of the University as a private property owner to exclude the defendant from its property. (App. 59a-68a). Defendant was convicted of trespassing and fined $15 plus $10 costs. (App. 68a).

A trial *de novo* upon the stipulated facts was held in the New Jersey Superior Court, Law Division, on February 20, 1979. The defendant was again found guilty and fined $15 plus $10 costs. (App. 48a). At the close of argument, the court stated it was adopting the opinion of the Municipal Court.

The Supreme Court of New Jersey certified the case while it was pending on appeal before the New Jersey Superior Court, Appellate Division. At the invitation of the supreme court, Princeton participated as an intervenor, with all the rights of a party. Princeton asserted in its brief and stressed at oral argument that its own First Amendment rights, and in particular its right of academic freedom, precluded the government from compelling Princeton to allow defendant's activity on its property.

The supreme court held that defendant had a constitutional right under Article I, paragraphs 6 and 18, of the New Jersey Constitution to leaflet and solicit on the campus of

[2] Rule 7:4-4(b) of the Rules Governing the Courts of the State of New Jersey.

Princeton University. (App. 16a-33a). The University, as property owner, was equated by the court with a governmental agency. Consequently, the court held that Princeton could regulate expressive activities by unaffiliated private persons only through neutral and reasonable rules as to time, place and manner. The court found Princeton's requirement for invitation and permission unconstitutional because the University regulations did not meet the standards to which public regulation of expressive activities is held.

In a timely petition for rehearing, Princeton urged that this interpretation brought the New Jersey Constitution into direct conflict with the U.S. Constitution in that, unlike a governmental entity, Princeton has expressive rights guaranteed to it by the First Amendment through the Fourteenth Amendment. Princeton distinguished *Prune Yard,* upon which the court had relied, by pointing out that unlike the shopping center in *Prune Yard,* the University uses its property for exercising its expressive rights. Princeton's petition for rehearing was denied without opinion. (App. 70a).

THE QUESTION PRESENTED IS SUBSTANTIAL

I. *In contravention of the First, Fifth and Fourteenth Amendments, the decision below denies the freedom of Princeton University and other private institutions to pursue academic objectives without state interference.*

At stake here is the ancient right of a university community to determine how its educational philosophy may best be implemented. The court below has mistakenly arrogated to itself that right. The court's decision, or any other assertion by state authority that interferes with exercise of that right by Princeton or other private universities, raises a fundamental and substantial question under the First Amendment. And it necessarily involves the courts in making forbidden judgments as to the content of expressive activity.

This case does not involve the rights of the faculty, students, employees or other members of the Princeton Univer-

sity community to engage in expressive activity on University property. It involves, purely and simply, the right of strangers with no University connection to use Princeton's property for their own expressive purposes.

The purpose of a private educational institution is research and education—to deal with ideas and concepts from whatever viewpoint, doctrine, cause or perspective it chooses. It may educate its students with the purpose of indoctrination in virtually any set of beliefs it espouses—popular or unpopular, reasonable or unreasonable. It may, as does Princeton University, regard education in a catholic sense of exposure to widely differing and conflicting viewpoints. Or it may seek to train people to a particular—even eccentric—viewpoint. But at either extreme, the institution's choice is totally protected by the U.S. Constitution from either perfidious or benign governmental interference, direction or control. The choice to create a liberal educational atmosphere, the choice to espouse a particular cause or doctrine, even the choice not to espouse particular views, are all exercises of First Amendment rights, equally protected by the Fourteenth Amendment from state imposed standards.

The court below focused its attention on Princeton University as a property owner rather than as a private university. It thus chose to ignore the protection accorded academic freedom "as a special concern of the First Amendment"[3] and failed to focus on the fact that the purpose of the property comprising a university campus is at bottom simply to promote the university's own educational viewpoint (a First Amendment right). Clearly use of the property may be regulated by exercises of state police power. But that regulation must, we submit, be neutral from a First Amendment perspective. Just as the

[3] *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978). At no point does the court below acknowledge or refer to Princeton's First Amendment rights, though it necessarily decides that those rights should be rejected in favor of appellee's state rights. It does recognize that academic freedom is involved and acknowledges that "private colleges and universities *must be accorded* a generous measure of autonomy and self-governance." (App. 31a) (emphasis added).

university cannot claim its academic freedom as a shield against state rules concerning health, safety and like matters, the state cannot use its police powers to control in any way the intellectual activities of the university.

The court below concluded that the state constitution requires Princeton to permit the use of its facilities by outsiders, "subject to suitable restrictions, [for] the reasonable exercise . . . of the constitutional freedoms of speech and assembly". What is "reasonable" or "suitable," according to the court, varies from case to case, depending upon the "primary use" of the property, "the extent and nature of the public's invitation to use the property," and whether "the purpose of the expressional activity" is in any way "discordant" with the private and public use of the property. (App. 27a-29a). This broad exercise of the police power was assertedly justified by the state's general interest in promoting expressive activity.

This implementation of state policy runs afoul of the U.S. Constitution in two ways. First, where the property is used by the owner itself for educational or other expressive purposes, requiring the property owner to permit others to use its property to promote ideas or beliefs which may be inconsistent with its own both violates its First Amendment protection from governmental interference[4] and diminishes the value of the property in its hands without compensation. This case differs from *Prune Yard* precisely because the property owner here has devoted its property to its own expressive uses. Thus, the issue is not simply whether the property owner may or may not be identified with the views expressed on its property by others but whether it must dedicate its property to expressive uses by others which, *in its opinion*,[5] are incompatible with its own educational purposes.

---

[4] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), discussed below at pp. 13-14.

[5] " 'It is the business *of a university* to promote that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine *for itself* on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added).

Second, the court below compounded rather than cured this vice when it held that the court, not the property owner, is the judge of what expressive activity by strangers is or is not compatible with a university's use of its property. That determination unavoidably thrusts New Jersey courts into the constitutionally impermissible role of passing judgment on the content of expressive activity.

In determining whether a private university is obligated by state law to honor speech and assembly rights of members of the general public, no court can possibly avoid judgments as to the content of the speech itself in relation to the academic purposes of the institution. The court below certainly made those judgments. Obviously, the determination of the relationship between the primary use of property and the purpose of the expressive activity necessarily involves qualitative judgments. A primary purpose of a Catholic university and a primary use of its physical facilities may be to instruct in the Catholic religion. Presumably it may extend an invitation to the general public to visit its campus so long as no speech or activity offensive to its religious beliefs takes place, and it may exclude those who do not abide by the rule. Who is the judge of whether a particular expression is sufficiently offensive to that school's philosophy to be properly banned on its campus? The court below said that decision is for the New Jersey courts. It failed to appreciate that the First Amendment prohibits government from making that decision.

Where private property is primarily used to promote private educational, ideological or religious objectives, the right to decide what is or is not compatible with those objectives is as much a First Amendment right as is formulating the objectives in the first place. How can it possibly be otherwise? Yet the court below denied that right to Princeton University when it concluded that:

> "defendant's attempt to disseminate political material was not incompatible with either Princeton University's professed educational goals or the University's overall use of its property for educational purposes." (App. 30a).

No governmental agency can claim a competence to interpret what is or is not compatible with Princeton's educational objectives without intruding upon Princeton's First Amendment right to determine, for itself, without governmental interference, those objectives, their meaning and how they are to be served.

" '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 520 (1976), quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Yet the test established in this case by the court below forces courts to examine the content of Princeton's educational objectives and the content of defendant's political material. Those judgments "above all else" are prohibited to government by the First Amendment.

II. *The decision below discourages all private universities and other institutions in New Jersey from using property owned by them to educate or persuade members of the general public to particular viewpoints.*

A state may in appropriate circumstances exercise its authority in aid of expressive activity by subjecting private property owners to neutral governmental standards as to the speech of persons on their premises. That is the holding of *PruneYard* in the context of shopping centers. And other comparable situations—such as privately owned residential communities—might well justify a state's curtailing private abridgment of expressive activity.

One can reasonably—even persuasively—argue that shopping centers increasingly are replacing downtown shopping districts and that private residential communities are less accessible than the residential districts of a town.[6] Traditional public

[6] The First Amendment protects expressive activities from private abridgment in company towns, *Marsh v. Alabama*, 326 U.S. 501 (1946), but not in shopping centers, *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976) (overruling *Amalgamated Food*

forums of communication are thus being significantly replaced by privately owned equivalents, making communication with the general public more difficult. In the interest of maintaining open and inexpensive communication channels, a state may impose neutral governmental standards on the private owners of property used as a shopping center, putting them in the shoes of government and allowing them to limit expressive activity only through reasonable time, place and manner regulations. This was the approach of the California Supreme Court in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

The approach of the court below is grounded on a radically different state policy. The decision does not simply affect traditional public forums which today are privately owned. Here, *all* owners of private property to which the general public is for any purpose invited are subjected to some measure of constitutional obligation to permit expressive activity by members of the general public. The all-encompassing scope and consequent vagueness of the court's "multifaceted test" (App. 27a) makes its bite uncertain in any given case. The risk that the private owner may be cast in a neutral governmental role with respect to the expressive activity of strangers can be minimized by property owners only by minimizing all public access to the premises involved.

Where property is used as a shopping center, the owner cannot avoid inviting the general public, whether or not that invitation subjects it to a state constitutional obligation to permit expressive activity on the premises. But where the property involved is used for educational, religious or ideological purposes, that alternative may be more practical. Such institutions must choose between opening their property to the general public—thereby risking judicial scrutiny of their pur-

---

Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968)); *see Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *Hudgens* did, however, suggest that state (or federal) law might, in appropriate circumstances, protect certain expressive activities from private abridgment even if the First Amendment did not. 424 U.S. at 513. *PruneYard Shopping Center v. Robins, supra*, followed this suggestion, again in a shopping center context.

poses to determine what expressive activity by others they must permit—or, insofar as feasible, excluding the general public in order to avoid that risk.

The extent to which particular private institutions can forego invitations to the general public to use their property for limited purposes will vary. But many private universities and colleges could elect to close their campuses and exclude the public from their libraries, lectures, dramatic performances, concerts—even their athletic events—rather than to subject their educational philosophies and their rules about expressive activity to judicial review. To the extent they do so, the decision below has effectively chilled their opportunity to communicate views to the general public and the general public's opportunity to learn. That chilling effect will remain until this Court resolves the constitutional question presented.

III. *The decision below misunderstands this Court's decision in* PruneYard *and, if allowed to stand, could encourage other states with constitutional provisions similar to those of New Jersey to arrive at similar conclusions.*

PruneYard Shopping Center v. Robins, supra, holds that the fact that the First Amendment does not itself protect expressive activity in a privately owned shopping center does not preclude states from doing so. A state may provide greater protection than the First Amendment to expressive activity within its borders; it may not provide less.

In a shopping center context, restricting private abridgment of speech undoubtedly promotes expressive activity. Shopping centers provide convenient and inexpensive means for communicating with thousands of citizens and have in varying degrees replaced downtown shopping streets as public forums. The state interest in preserving such a channel of communication is clear. And the cost and inconvenience to the property owner is not substantial enough to amount to a "taking" without compensation in violation of the Fifth and Fourteenth Amendments.

The property owner in *PruneYard* also raised a First Amendment claim which was rejected by this Court. *Id.* at 64 L.Ed.2d 754-56. While the property obviously was not used for any First Amendment purpose of the owner, he contended that requiring him to permit expressive activity by others was equivalent to the government's compelling him to convey messages. This Court found that argument inapposite in a shopping center context on the ground that the owner was not being compelled to convey any message nor would the general public associate the owner with any particular message conveyed.

Princeton University is not a shopping center catering to thousands of customers daily. Its business is not business, but ideas. Its interest, and its constitutionally protected right, is in establishing its own standards for the ideas which can be expressed on its property, by whom, and under what circumstances.

The First Amendment right of a private institution to control in virtually every respect the views it espouses without governmental intervention is confirmed by *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). As a newspaper, the *Miami Herald* enjoyed explicit First Amendment rights, but the Florida legislature believed that the political process would be enhanced if political candidates were given the right to reply to press criticism. It was "vigorously argue[d] that government has an obligation to ensure that a wide variety of views reach the public." *Id.* at 247-48. The increasing power of the press—and the political need to dilute that power by providing greater access—were urged as justification for the statute, which was said to be aimed at implementing more effectively the policies underlying the First Amendment. This Court responded:

> "However much validity may be found in these arguments, at each point the implementation of a remedy *such as an enforceable right of access* necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a

confrontation with the express provisions of the First Amendment. . . ." *Id.* at 254 (emphasis added, footnote omitted).

Accordingly, this Court rejected government-enforced access to the press.

The case is instructive in two respects. First, this Court did not reach its conclusion by balancing property rights against rights of free expression, although property rights of the *Miami Herald* were clearly involved. Second, though the legislative purpose was to foster opportunities for the free expression of diverse views, this Court concluded:

> "Even if a newspaper would face no additional costs to comply with a compulsory access law . . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper . . . whether fair or unfair . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.* at 258 (footnote omitted).

The editorial choices of the editors—"whether fair or unfair"—were not subject to a governmental test of "reasonableness", nor were the procedures by which those choices were made. Likewise, when Princeton University—exercising the traditional academic freedom of a private university—chooses what to hear from strangers on its campus under what circumstances, that choice cannot constitutionally be subject to governmental regulation or requirements of reasonableness.

Like California and New Jersey, most states have constitutional free speech guarantees which use language creating an affirmative right, rather than simply a restraint on govern-

mental interference.[7] Thus, it is open to those states to follow New Jersey in imposing broad obligations on private colleges and universities, unless this Court limits New Jersey's open-ended and mistaken interpretation of *Prune Yard.*

As the decision below demonstrates, there are risks to expressive freedom from too-expansive governmental efforts to promote it. State government is not, under *Prune Yard,* permitted to expand the expressive freedom of appellee at the cost of Princeton University's substantial First Amendment rights. The fact that this Court did not find California's rule to interfere with the First Amendment rights of the PruneYard's owner surely rests on the insubstantial nature of those rights in the context of a shopping center, to which the general public is necessarily invited, which is devoted to commercial—not expressive—purposes, and which replaces traditional public forums. Surely the capacity of states to prevent private abridgment of expressive activity on private property is limited to those factual situations where a substantial need can be shown[8] and where the expressive rights of the property owner itself are not thereby diminished. A state may not promote the expressive rights of some at the cost of curtailing those rights in others.

The ability of an owner of property devoted to educational, religious or ideological purposes to be selective in its invitees and to exclude those who, in its judgment, do not contribute to its educational or ideological purposes is a fundamental right protected from state interference by the First and Fifth Amendments, through the Fourteenth. Where the property right is used in aid of the expressive right, the U.S. Constitution protects both rights.

---

[7] *See* Note, *Private Abridgment of Speech and the State Constitutions,* 90 Yale L. J. 165, 177-88 (1980).

[8] *Cf. Robins v. Pruneyard Shopping Center, supra* at 592 P.2d 345, 347. The decision below, in contrast, was not based on any finding that traditional avenues of expression had been supplanted. Indeed, the supreme court expressly noted that numerous public areas near the Princeton campus furnished ample means for the dissemination of information, views and ideas. (App. 14a).

CONCLUSION

For each of the reasons set forth above, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

NICHOLAS DEB. KATZENBACH
Counsel of Record
THOMAS H. WRIGHT, JR.

Princeton University
318 Nassau Hall
Princeton, New Jersey 08544
(609) 452-5560
Attorneys for Appellant
Princeton University

Of Counsel:

MICHAEL A. CANDIDO, JR.
MARGARET B. G. FREIBERG
Old Orchard Road
Armonk, New York 10504
(914) 765-1900

March 17, 1981.

APPENDIX

TABLE OF CONTENTS

	Page
Opinion of the Supreme Court of New Jersey in *State of New Jersey v. Chris Schmid*—November 25, 1980	1a
Order of the Superior Court of New Jersey, Law Division—Criminal, Mercer County, in *State of New Jersey v. Chris Schmid*—February 20, 1979	48a
Opinion of the Municipal Court of the Borough of Princeton in *State of New Jersey v. Chris Schmid*—October 30, 1978	49a
Order of the Supreme Court of New Jersey in *State of New Jersey v. Chris Schmid* denying Princeton University's petition for rehearing—issued December 18, 1980, entered December 19, 1980	70a
Notice of Appeal in the Supreme Court of New Jersey—March 10, 1981	71a

SUPREME COURT OF NEW JERSEY
A-100 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.
CHRIS SCHMID,
Defendant-Appellant.

Argued February 4, 1980—Decided November 25, 1980
On Certification to the Superior Court,
Law Division.

The opinion of the Court was delivered by HANDLER, J.

While distributing political literature on the campus of Princeton University, defendant Chris Schmid, a member of the United States Labor Party, was arrested and charged by the University with trespass upon private property. He was subsequently convicted under the State's penal trespass statute. On this appeal he challenges the conviction on the grounds that it stems from a violation of his federal and state constitutional rights to freedom of speech and assembly.

I

On April 5, 1978, Chris Schmid[1] was distributing and selling political materials on the main campus of Princeton University, a private, non-profit institution of higher education located in the Borough of Princeton, New Jersey. These materials dealt with the City of Newark mayoral campaign and with the United States Labor Party in general. Schmid was not a student at Princeton University nor was the Labor Party a university-affiliated or campus-based organization. On certain

[1] Another Labor Party member, Stephen Komm, was assisting Schmid in the on-campus distribution and sale of materials. Komm also was arrested for trespass, but the charges against him were dismissed in municipal court.

previous occasions members of the Labor Party had unsuccessfully sought to obtain University permission to distribute and sell political materials on campus. On this particular occasion in April 1978, however, no such permission was either sought or received.

Under the University regulations then in effect, permission was a prerequisite for the on-campus distribution of materials by off-campus organizations. No such permission was required, however, for the same activity by a university-affiliated organization or by Princeton students. The regulatory language pertaining to off-campus organizations stated in part:

> Demonstrations and the distribution of leaflets, statements, or petitions . . . are permitted on the campus unless, or until, they disrupt regular essential operations of the University or significantly infringe on the rights of others. On the same grounds, the campus is open to speakers whom students, faculty, or staff wish to hear, and to recruiters for agencies and organizations in whom students or faculty have an interest. [University Regulations as passed by the Council of the Princeton University Community, May 1975, as amended 1976.]

These regulations further provided that no solicitation of either sales or charitable contributions was to be permitted on campus without the express authorization of the appropriate University officials. Moreover, door-to-door political or charitable solicitation was generally prohibited. *Ibid.* The University revised these regulations in 1979.[2]

---

[2] The revised regulations now read in pertinent part as follows:

REGULATIONS GOVERNING SOLICITATION (INCLUDING COMMERCIAL SALES, FUNDRAISING, AND DISTRIBUTION OF LITERATURE) BY OFF-CAMPUS INDIVIDUALS OR ORGANIZATIONS

No individual or organization may distribute literature, advertise, or otherwise solicit customers, seek donations, or make sales on campus without the express authorization of the Office of the Dean of Student Affairs.

COMMERCIAL SALES. The Office of the Dean of Student Affairs may grant permission for solicitations and sales by off-campus

Schmid stipulated that he had been aware in April 1978 that the existing University policy was against allowing "per-

---

business concerns only when specifically requested to do so by a recognized University students [*sic*], faculty, or employee organization. Such permission, when granted, will be subject to such limitations as the Dean of Student Affairs may prescribe.

CHARITABLE, POLITICAL, OR RELIGIOUS SOLICITATION. As a general rule, representatives of off-campus political, religious, and charitable groups will not be permitted to solicit on campus. However, individuals acting on behalf of candidates for public office or of *bona fide* political or religious organizations may obtain permission to sell or distribute their political or religious literature under the following guidelines:

1. Non-members of the University community who are acting on behalf of candidates for public office or of *bona fide* political or religious organizations, and who wish to seek permission to distribute and/or sell political and religious literature on the campus should apply to the Office of the Dean of Student Affairs between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday.

2. In choosing among the six sites where political and religious literature may be sold or distributed which were recommended by the Council of the Princeton University Community preference will be given to three locations: the area adjacent to the Student Center (on the Library side), the area surrounding Alexander Hall, and the area around the University Store.

3. Permission for the sale or distribution of political and religious literature may be granted only for the hours between 9:00 a.m. and 5:00 p.m. seven days a week.

4. The number of persons, who, at any one time, will be permitted to sell or distribute literature for any particular candidate or group is limited to one or two at any given location, and to five or six on the campus as a whole.

5. The number of occasions on which candidates or groups will be permitted to sell or distribute literature will be limited normally to six visits during a given month. In special situations, such as an approaching election, more frequent visits may be permitted.

6. The total number of people distributing or selling literature at any one location on campus will be limited. When several groups wish to distribute literature at a particular location, in accordance with general University policy, preference in use of campus facilities will be given to members of the Univer-

sons not connected with the University to enter campus uninvited and without sponsorship for the purpose of soliciting support or contributions." He had, in fact, previously been told on February 15, 1978 that his presence and activity on campus without permission were "forbidden" and that he "was subject to arrest for trespassing if he entered on campus to solicit again [without University permission]."

Schmid was arrested for trespass on University property on the day in question by a member of the Princeton University Security Department and charged as a disorderly person under N.J.S.A. 2A:170-31.[3] He was convicted of trespass in Princeton

---

sity community. In acting on requests from members of outside political or religious groups and representatives of candidates, individuals who are sponsored by members of the University community will be preferred.

7. Harassment of members of the University community by those selling or distributing literature, or sale or distribution outside of the hours or locations for which permission has been granted, will be cause for the immediate revocation of permission for the sale or distribution of literature by those involved.

8. Decisions regarding requests under these guidelines will need to take into account both any special circumstances that may relate to University activities and the burden that permission to sell or distribute political or religious literature may place on the University's security forces and administrative staffs.

[University Regulations as passed by the Council of the Princeton University Community, May 1975, as amended 1979).

[3] That statute provided in pertinent part that

[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner, occupant, lessee or licensee thereof or after public notice on the part of the owner, occupant, lessee or licensee forbidding such trespassing, which notice has been conspicuously posted adjacent to a usual entry way thereto, is a disorderly person and shall be punished by a fine of not more than $50. [N.J.S.A. 2A:170-31.]

The offense covered by that statute, repealed by L. 1978, c. 95, § 2C:98-2 (effective September 1, 1979), is now contained in the New Jersey Code of Criminal Justice as N.J.S.A. 2C:18-3 (L. 1978, c. 95, § 2C:18-3, effective September 1, 1979). The correct statute to be applied here, of course, is N.J.S.A. 2A:170-31, which was in effect at the time of the alleged offense. See N.J.S.A. 2C:1-1(b).

Borough Municipal Court on October 20, 1978 and fined $15 plus $10 costs. On February 20, 1979, following a trial *de novo* in Superior Court, Law Division, pursuant to R. 3:23-8, Schmid was again found guilty of trespass and the same monetary penalty was reimposed. While defendant's appeal was pending in the Appellate Division, this Court directly certified the case under R. 2:12-1. 81 N.J. 344, 407 A.2d 1218 (1979). At the Court's invitation, Princeton University intervened in this appeal. The Association of Independent Colleges and Universities in New Jersey also filed an *amicus curiae* brief with this Court.

Defendant contends on this appeal that his trespass conviction offends both the federal and State Constitutions. He specifically asserts that his conduct—distributing political literature on the main campus of Princeton University—constituted an exercise of his freedoms of speech and assembly, an exercise protected both by the First Amendment to the United States Constitution and by Article I, paragraphs 6 and 18 of the New Jersey Constitution; he maintains that the University was thus constitutionally obligated to permit this activity on its campus. In opposition, the State and the University contend that defendant's conduct encroached unlawfully upon legitimate and protectable private property rights. They argue that the University as a private entity had not undertaken state governmental action and had not invited or made a public use of its property sufficient to subject it to the strictures of the speech and assembly guarantees under either the federal or the State constitution. For these reasons, they urge that the University, in prosecuting Schmid for trespass upon private property, did not violate his individual constitutional rights.

We now address the respective federal and State constitutional issues framed by this appeal.

II

Defendant asserts initially that his conviction in this case violated his rights under the First Amendment to the United States Constitution. The First Amendment was designed by its

framers to foster unfettered discussion and free dissemination of opinion dealing with matters of public interest and governmental affairs. *Mills v. Alabama*, 384 U.S. 214, 218-219, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484, 488 (1966); *State v. Miller*, 83 N.J. 402, 412, 416 A.2d 821 (1980). It embraces the freedom to distribute information and materials to all citizens, a freedom "clearly vital to the preservation of a free society." *Martin v. Struthers*, 319 U.S. 141, 146-147, 63 S.Ct. 862, 864-865, 87 L.Ed. 1313, 1319 (1943); see *Lovell v. Griffin*, 303 U.S. 444, 450-451, 58 S.Ct. 666, 668-669, 82 L.Ed. 949, 953 (1938). The guarantees of the First Amendment are effectuated against potential state interference through the Fourteenth Amendment by limiting the extent to which states can restrict individuals in the exercise of rights of speech and assembly. See, *e.g., Schneider v. State*, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155, 164 (1939). The First Amendment, however, does not similarly protect rights of speech and assembly against interference or impairment by private individuals. The Amendment imposes no limitations upon "the owner of private property used nondiscriminatorily for private purposes only," even though such use may trench upon the speech and assembly activities of other persons. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 2228, 33 L.Ed.2d 131, 142 (1972).

It is clear that public colleges and universities, as instrumentalities of state government, are not beyond the reach of the First Amendment. *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 2345, 33 L.Ed.2d 266, 279 (1972). A public college or university, created or controlled by the state itself, is an arm of state government and, thus, by definition, implicates state action. *Powe v. Miles*, 407 F.2d 73, 82 (2 Cir. 1968); see *American Future Systems, Inc. v. Pennsylvania State Univ.*, 618 F.2d 252, 255 (3 Cir. 1980).

A private college or university, however, stands upon a different footing in relationship to the state. Such an institution is not the creature or instrument of state government. Even though such an institution may conduct itself identically to its state-operated counterparts and, in terms of educational pur-

poses and activities, may be virtually indistinguishable from a public institution, see McKay, "The Student As Private Citizen," 45 *Denver L.J.* 558, 560 (1968), a private college or university does not thereby either operate under or exercise the authority of state government. Hence, the state nexus requirement that triggers the application of the First Amendment is not readily met in the case of a private educational institution. See, *e.g., Grafton v. Brooklyn Law School,* 478 F.2d 1137, 1143 (2 Cir. 1973); *Blackburn v. Fisk Univ.,* 443 F.2d 121, 123 (6 Cir. 1971); see generally Annot., "Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 U.S.C.A. § 1983," 37 A.L.R.Fed. 601 (1978).

Notwithstanding the primary thrust of the First Amendment against state governmental interference with expressional freedoms, the guarantees of this Amendment may under appropriate conditions be invoked against nongovernmental bodies. In particular settings, private entities, including educational institutions, may so impact upon the public or share enough of the essential features of governmental bodies as to be engaged functionally in "state action" for First Amendment purposes. The more focused inquiry therefore must be turned to those circumstances that can subject an entity of essentially nongovernmental or private character to the requirements imposed by the First Amendment.

One test of such state action involves the presence of an interdependent or symbiotic relationship between the private entity and the state government. This standard was utilized in *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); in which the Supreme Court held that a privately-owned restaurant which leased premises in a government-owned and government-maintained parking garage was subject to the Equal Protection Clause of the Fourteenth Amendment; the restaurant thus could not refuse to serve blacks. The Court stressed that the parking facility was essentially a government building engaged in a governmental purpose and that the State and the restaurant mutually benefit-

ed from their "joint participation" in the operation. 365 U.S. 723-726, 81 S.Ct. at 860-862, 6 L.Ed.2d at 51-52.

Another basis for determining the existence of state action is the extent of direct governmental regulation of the private entity.[4] This standard was applied in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 463, 72 S.Ct. 813, 821, 96 L.Ed. 1068, 1077 (1952), wherein the Supreme Court held that the First and Fifth Amendments to the Federal Constitution were applicable to a policy decision made by a private transit company operating in the heavily-regulated field of public transportation because that decision was subject to approval by a governmental agency. The governmental regulation or control standard, however, is fairly difficult to administer as a means for positing state action. The Supreme Court has stated that the mere fact that a business is subject to extensive state regulation will not in and of itself convert the actions of that business entity into state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S.Ct. 449, 453, 42 L.Ed.2d 477, 483-484 (1974). There must be demonstated a "sufficiently close nexus" between the state regulation and the allegedly unconstitutional actions of the regulated business entity before it can be said that those actions emanate from or can be attributed to state government. *Id.* at 351, 95 S.Ct. at 453, 42 L.Ed.2d at 484. *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171, 92 S.Ct. 1965, 1970, 32 L.Ed.2d 627, 636-637 (1972) (Equal Protection Clause of Fourteenth Amendment did not apply to private club because state's regulation of club's liquor license did not directly involve state in club's racially-exclusive practices).

Both of these approaches for ascertaining state action have been followed in challenges to the actions of private colleges or

---

[4] There appears to be some confusion as to whether this second basis for state action has totally supplanted the earlier *Burton* symbiotic relationship test. Some courts, in light of *Jackson v. Metropolitan Edison*, 419 U.S. 345, 95 S. Ct. 449, 42 L.Ed.2d 477 (1974), appear to have adopted the view that the *Burton* test is no longer viable. See *Greene v. Johns Hopkins Univ.*, 469 F. Supp. 187, 194-195 (D.Md. 1979) (discussing this confusion).

universities as violative of First Amendment rights. Among the factors most often marshaled to show state action are that the institution received government funds, that the institution as performing a governmental function by providing education, that it was state-accredited or state-chartered or was otherwise highly regulated by the state, that the college derived economic benefit from tax exemptions, that it indirectly enforced governmental laws, or, in some instances, that the college had been built on formerly public lands. See, *e.g., Blackburn v. Fisk Univ., supra,* 443 F.2d at 122-124. See also, Cohen, "The Private-Public Legal Aspects of Institutions of Higher Education," 45 *Denver L.J.* 643, 645-647 (1968); Schubert, "State Action and the Private University," 24 *Rutgers L.Rev.* 323, 334-347 (1970). For the most part, however, such challenges have failed. See *Cannon v. Univ. of Chicago,* 559 F.2d 1063 (7 Cir. 1977), rev'd on other grounds, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *Krohn v. Harvard Law School,* 552 F.2d 21, 24 (1 Cir. 1977); *Greenya v. George Washington Univ.,* 512 F.2d 556, 559-562 (D.C. Cir. 1975), *cert. den.,* 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975); *Blouin v. Loyola Univ.,* 506 F.2d 20, 22 (5 Cir. 1975) (*per curiam*); *Wahba v. New York Univ.,* 492 F.2d 96, 101 (2 Cir. 1974); *cert. den.,* 419 U.S. 874, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974); *Blackburn v. Fisk Univ., supra,* 443 F.2d at 123; *Browns v. Mitchell,* 409 F.2d 593, 594-595 (10 Cir. 1969); *Greene v. Johns Hopkins Univ.,* 469 F. Supp. 187, 196-198 (D. Md. 1979); *Huff v. Notre Dame High School of West Haven,* 456 F. Supp. 1145, 1147-1149 (D. Conn. 1978); *Pendrell v. Chatham College,* 370 F. Supp. 494, 499 (W.D. Pa. 1974); *Furumoto v. Lyman,* 362 F. Supp. 1267, 1276-1280 (N.D. Cal. 1973); *Grossner v. Trustees of Columbia Univ.,* 287 F. Supp. 535, 546-549 (S.D.N.Y. 1968); *contra, Braden v. Univ. of Pittsburgh,* 552 F.2d 948, 961 (3 Cir. 1977); *Rackin v. University of Pennsylvania,* 386 F. Supp. 992 (D.C. Pa. 1974).[5]

[5] These cases, evincing the difficulty of positing "state action" to private educational institutions under the First Amendment, generally have dealt with the internal affairs of the particular institutions, such as faculty employment and student discipline, and not with the conduct of members of the general public *vis-a-vis* the institutions, as

The record reveals that Princeton University, though privately owned and controlled, is involved in a continuous relationship with the state. The University is a state-accredited educational institution; it participates in and receives, as do other public and private educational institutions, the advantages of certain State programs, *e.g., The New Jersey Educational Facilities Authority Law,* N.J.S.A. 18A:72A-1 *et seq.* (au-

---

here. It may be that such a distinction would, in an appropriate case, warrant a different and less rigorous standard as to what constitutes "state action" for First Amendment purposes.

In such cases, where the rights of the general public are at stake, the importance attached to the free exercise of First Amendment rights could be a potent counterpoise against the need for a private university to retain control of its own internal affairs. See *Weise v. Syracuse University,* 522 F.2d 397, 406 (2 Cir. 1975)("a consideration of whether there is state action necessarily entails a balancing process"). *Cf., e.g., Williams v. Howard Univ.,* 528 F.2d 658, 660 (D.C. Cir. 1976), *cert. den.* 429 U.S. 850, 97 S.Ct. 138, 50 L.Ed.2d 123 (1976); *Spark v. Catholic Univ. of America,* 510 F.2d 1277, 1281-1282 (D.C. Cir. 1975) (*per curiam*); *Jackson v. Statler Foundation,* 496 F.2d 623, 629 (2 Cir. 1974), *cert. den.* 420 U.S. 927, 95 S. Ct. 1124, 43 L.Ed.2d 397 (1975) (These cases indicate that when racial discrimination has been assertedly practiced by a private entity contrary to the Equal Protection Clause of the Fourteenth Amendment, a less exacting test is appropriate for determining the presence of "state action"). The balancing of the interests of the public in expressional freedoms and the importance of the autonomy and independence of private educational institutions is addressed later in our opinion. See discussion *infra* at 566, 567, at 631-632.

Additionally, the differences between public and private educational institutions may, in many situations, be negligible. See McKay, "The Student As Private Citizen," 45 *Denver L.J.* 558, 560 (1968). In such cases, the same First Amendment protections might conceivably be required. *Cf. Marsh v. Alabama,* 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946) (private company town subject to first Amendment where performing same functions as municipality). Given the importance attached to higher education and the significant social contributions of private educational institutions, a wide disparity between the nature and scope of permitted speech at private universities and that which must be allowed at public universities would seem anomalous and undesirable. In light of the decision reached in this case, however, we need do no more than note here these added lines of analysis.

thority created to issue bonds for capital improvements and new construction on the campuses both of public and private post-secondary educational institutions); *The Higher Education Assistance Authority Law*, N.J.S.A. 18A:72-1 *et seq.* (creating fund to provide loans to New Jersey students attending public or private post-secondary educational institutions). Its property and buildings on the central campus, with the exception of its ice skating and hockey facility and its campus parking lots, are tax-exempt. The University also receives state-budgeted funds through *The Independent College and University Assistance Act*, N.J.S.A. 18A:72B-15 *et seq.* In addition, acording to the stipulations of the parties, the University Security Department, some of whose employees are deputized to make arrests under the laws of New Jersey, is primarily responsible for providing security services for the entire University community.

Nonetheless, this congeries of facts does not equate with state action on the part of Princeton University. See, *e.g.*, *Blackburn v. Fisk Univ.*, *supra*, 443 F.2d at 122-124. Princeton University is, indisputably, predominantly private, unregulated and autonomous in its character and functioning as an institution of higher education. The interface between the University and the State is not so extensive as to demonstrate a joint and mutual participation in higher education or to establish an interdependent or symbiotic relationship between the two in the field of education.

Moreover, the degree of State regulation does not evince a "close nexus" between the State and Princeton University's policies, particularly with regard to the public's access to the University campus and facilities and, even more particularly, with regard to either the distribution of political literature or other expressional activities on University property. Furthermore, the resort by Princeton University to the State's trespass laws to protect its own rights of property does not, as suggested in the separate opinion of Justice Pashman, *post* at 573, at 635 constitute state action for First Amendment purposes. In the absence of a protectable First Amendment right in the individual, the property owner's recourse to appropriate and otherwise

neutral penal sanctions to protect its legitimate interests does not constitute action by State nor clothe the property owner with a state identity for First Amendment purposes. See *Bell v. Maryland*, 378 U.S. 226, 327-333, 84 S.Ct. 1814, 1836-1872, 12 L.Ed.2d 822, 856-859 (1964) (Black, J., dissenting).[6]

Although Princeton University is thus not subject to First Amendment obligations by virtue of a joint relationship with or direct regulation by the State, there remains to be considered still another standard for determining First Amendment applicability, *viz.*, the "public function doctrine." See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158, 98 S.Ct. 1729, 1734, 56 L.Ed.2d 185, 195 (1978). Even though a private entity is not engaged in "state action," it may nevertheless be required to honor First Amendment rights if its property is sufficiently devoted to public uses. See *Marsh v. Alabama*, 326 U.S. 501, 506, 66 S.Ct. 276, 278, 90 L.Ed. 265, 268 (1946). "The more an owner for his advantage opens up his property to use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.*, 326 U.S. at 506, 66 S.Ct. at 278, 90 L.Ed. at 268.

A company-owned town which possessed all of the characteristics of a municipality, providing full access to the public to all of its facilities including its shopping district, was held to be subject to the strictures of the First Amendment. *Id.* at 503,

---

[6] To the extent *Shelley v. Kramer*, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948) might assertedly support the notion that the invocation of state authority which in and of itself effectuates racial discrimination constitutes state action under the Fourteenth Amendment, it has been noted that several cases have recognized the existence of a double "state action" standard, *i.e.*, "a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims". *Jackson v. Statler Foundation*, 496 F.2d 623 (2 Cir. 1974). See also, *e.g.*, *Greenya v. George Washington Univ.*, 512 F.2d 556, 560 (D.C. Cir. 1975), *cert. den.*, 423 U.S. 995, 96 S. Ct. 422, 46 L.Ed.2d 369 (1975); *Aasum v. Good Samaritan Hospital*, 542 F.2d 792, 794 (9 Cir. 1976). But see *contra*, *Isaacs v. Bd. of Trustees of Temple Univ.*, 385 F. Supp. 473, 485 n. 11 (E.D. Pa. 1974). See *supra* at 546 n.5, at 621 n.5.

508-509, 66 S.Ct. at 277, 280, 90 L.Ed. at 266-267, 270. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 317, 88 S.Ct. 1601, 1608, 20 L.Ed.2d 603, 611 (1968), the Supreme Court found "striking" similarities between a company town, as described in *Marsh v. Alabama, supra,* and a privately-owned shopping mall. Specifically noting the common sidewalks and parking areas and the invitation to the public to use the property, the Court held that it was a violation of the First Amendment to apply a trespass statute to union members picketing a non-unionized supermarket located in the privately-owned shopping mall. *Id.* at 322-323, 88 S.Ct. at 1610-1611, 20 L.Ed.2d at 614-615; see T. Emerson, *The System of Freedom of Expression* 307-310 (1970).

A different result was reached in *Lloyd Corp. v. Tanner, supra.* The majority of the Supreme Court in *Lloyd* held that a privately-owned shopping mall could bar the distribution of anti-war handbills on mall property. It distinguished *Logan Valley* on the ground that the subject matter of the handbills in *Lloyd* was unrelated to the shopping center's business. 407 U.S. at 564-565, 92 S.Ct. at 2227, 33 L.Ed.2d at 140. With respect to the public use of the property, the Court noted that the invitation for public use of the shopping mall was not "open ended" or for "any and all purposes." *Id.* at 565, 92 S.Ct. at 227, 33 L.Ed.2d at 140. It also found significance in the fact that there were adequate alternative means of communication, *i.e.*, that there were public areas directly outside the mall that were available for the distribution of the anti-war handbills. *Id.* at 566-567, 92 S.Ct. at 2227-2228, 33 L.Ed.2d at 141. The Court reinforced the *Lloyd* holding in *Hudgens v. National Labor Relations Board,* 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), wherein it ruled that striking warehouse employees who sought to picket their employer's retail store located in a privately-owned shopping center were not protected under the First Amendment. A majority of the *Hudgens* Court supported the view that *Lloyd* effectively overruled and substantially constricted the reach of *Logan Valley.* See *Hudgens v. NLRB, supra,* 424 U.S. 523, 524, 535, 96 S.Ct. at 1038, 1039, 1044, 47

L.Ed.2d at 209, 210, 216. Very recently, in *Prune Yard Shopping Center v. Robins,* U.S. , 100 S.Ct. 2035, 2039-2041, 64 L.Ed.2d 741, 751-752 (discussed *infra* at 552, at 624), the Supreme Court recapitulated this judicial history and observed that the rationale of *Logan Valley* had been "substantially repudiated" by *Lloyd* and had been actually overruled by *Hudgens.*

While the Supreme Court has now indicated that the *Logan Valley* decision has been overruled, it did not reject or disapprove of *Lloyd Corp. v. Tanner,* (although the continued utility of *Lloyd* has been questioned. See concurring opinion of Justice Schreiber, *post* at 578-579, at 638-639).

If the *Lloyd* approach were applied in the present case, it would be difficult to conclude under the circumstances disclosed by the record that Princeton University is directly subject to First Amendment strictures. See generally, Note, "First Amendment and the Problem of Access to Migrant Labor Camps after *Lloyd Corp. v. Tanner,*" 61 *Cornell L.Rev.* 560, 578-580. For example, in assessing the availability of alternative means of communication, there are public streets, sidewalks, parking areas, and a train station immediately contiguous to Princeton University's main campus and most of its buildings and facilities; a major street with public sidewalks bisects the University campus. These numerous public areas apparently furnish to members of the public, as well as the college community, ample alternative locations other than the property of the University itself as means for the dissemination and exchange of information views, and ideas.

Were we to concentrate upon the other aspects of the *Lloyd* standard (notwithstanding their precedential diminution as a result of *Hudgens*), those focusing upon the scope of the public's invitation and the nature of the expressional activities in relation to the use of private property, the applicability of the First Amendment is less clear. Arguably, there are a broad public invitation and wide use of University property that serve to encourage expressional rights and are conducive to the

educational goals of Princeton University. (See discussion *infra* at 564-566, at 630-632). Nevertheless, it must be recognized that the public uses and expressional activities that are permitted by the University are subordinate to its overall educational policies. In this sense, while the invitation to the public is broad, it is not truly "open-ended" or for "any and all purposes." *Lloyd Corp. v. Tanner, supra,* 407 U.S. at 565, 92 S.Ct. at 227, 33 L.Ed.2d at 140. Therefore, although Princeton University's *raison d'etre* is more consonant with free speech and assembly principles than a shopping center's purposes might be, the attachment of First Amendment requirements to the University by virtue of the general public's permitted access to its property would still be problematic.

If we were to examine whether Princeton University has in the pervasive and all-inclusive sense of *Marsh v. Alabama, supra,* undertaken to act as a local government body, the applicability of the First Amendment remains doubtful. The nature of college community life as determined by Princeton University, even with its residential characteristics, would not seem to invest the University with the fundamental attributes of a government substitute or surrogate in the manner deemed critical for positing state action in *Marsh v. Alabama, supra.* (See discussion *supra* at 549, at 622). A private educational institution such as Princeton University involves essentially voluntary relationships between and among the institution and its students, faculty, employees, and other affiliated personnel, and the life and activities of the individual members of this community are directed and shaped by their shared educational goals and the institution's educational policies. The public's invitation to use college facilities is incident to the educational life of the institution and must comport and be integrated with its educational endeavors. It is dubious therefore whether Princeton can or should be regarded as a quasi-governmental enclave or the functional equivalent of a "company town," which has all of the characteristics of a municipality, for First Amendment purposes. *Powe v. Miles,* 407 F.2d 73, 80 (2 Cir. 1968); *McLeod v. College of Artesia,* 312 F. Supp. 498, 502

(D.N.M. 1970); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 549 (S.D.N.Y. 1968).

In attempting to pull together these diverse strands of constitutional doctrine, it is apparent that First Amendment principles as applied to the owners of private property are still evolving. The precise question in this case has not been definitively resolved or even clearly foreshadowed by extant decisional authority. Furthermore, invoking First Amendment strictures against private property owners, as has been noted, necessarily engenders countervailing concerns for legitimate private property rights, *e.g.*, *PruneYard Shopping Center v. Robins, supra.* In this case, the difficulty of the decisional task and the uncertainty of its solution posed by this consideration are further compounded because the private property is an educational institution. Such institutions, in addition to their own protectable private property interests, are committed to the achievement of important societal educational objectives which are generally consistent with First Amendment purposes. While these purposes may temper the protections accorded private property, the legitimate and genuine property interests of educational institutions should not be denuded because of the apparent coincidence between the goals of higher education and the First Amendment.

We are thus confronted with strong crosscurrents of policy that must be navigated with extreme care in reaching any satisfactory resolution of the competing constitutional values under the First Amendment in this case. These concerns persuade us to stay our hand in attempting to decide the question of whether the First Amendment applies to Princeton University in the context of the present appeal. Defendant, moreover, has presented compelling alternative grounds for relief founded upon the State Constitution, which we now reach.

III

Defendant asserts that under the state Constitution he is afforded protection of his expressional rights even if it is not

clear that the First Amendment would serve to grant that protection. The United States Supreme Court has recently acknowledged in the most clear and unmistakable terms that a state's organic and general law can independently furnish a basis for protecting individual rights of speech and assembly. *Prune Yard Shopping Center v. Robins, supra,* U.S. at , 100 S.Ct. at 2040, 64 L.Ed.2d at 752. The view that state constitutions exist as a cognate source of individual freedoms and that state constitutional guarantees of these rights may indeed surpass the guarantees of the federal Constitution has received frequent judicial expression. See, *e.g., Prune Yard Shopping Center v. Robins, supra,* U.S. , , 100 S.Ct. 2035, 2039-2040, 64 L.Ed.2d at 750, 752; *id.* at , 100 S.Ct. at 2046, 64 L.Ed.2d at 758 (Marshall, J., concurring); *Oregon v. Hass,* 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 575-576 (1975); *Cooper v. California,* 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730, 734 (1967); *Armstrong v. Egeler,* 563 F.2d 796, 801 (6 Cir. 1977); *Shiras v. Britt, Ark.,* 589 S.W.2d 18, 19 (Sup. Ct. 1979); *People v. Rucker,* 26 Cal.3d 368, 389-391, 605 P.2d 843, 856, 162 Cal. Rptr. 13, 26 (Sup. Ct. 1980); *People v. Privitera,* 23 Cal.3d 697, 710, 591 P.2d 919, 926, 153 Cal. Rptr. 431, 438 (Sup. Ct. 1979), *cert. den.,* 444 U.S. 949, 100 S.Ct. 419, 62 L.Ed.2d 318 (1979); *State v. Kaluna,* 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (Sup. Ct. 1974); *O'Connor v. Johnson,* 287 N.W.2d 400, 405 (Minn. Sup. Ct. 1979); *Keene Publishing Corp. v. Cheshire County Superior Court, N.H.,* 406 A.2d 137, 138 (Sup. Ct. 1979); *Cooper v. Morin,* 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1194, 424 N.Y.S.2d 168, 174 (Ct. App. 1979), *cert. den.,* U.S. , 100 S.Ct. 2965, 64 L.Ed.2d 840 (1980); *Westchester Rockland Newspapers, Inc. v. Leggett,* 48 N.Y.2d 430, 436, 442, 399 N.E.2d 518, 521, 525, 423 N.Y.S.2d 630, 634, 638 (Ct. App. 1979); *Sharrock v. Dell Buick-Cadillac, Inc.,* 45 N.Y.2d 152, 160-161, 379 N.E.2d 1169, 1173, 408 N.Y.S.2d 39, 43-44 (Ct. App. 1978); *People v. Onofre,* 72 A.D.2d 268, 270, 424 N.Y.S.2d 566, 568 (App. Div. 1980);[7] see Brennan, "State

[7] This recent upsurge in cases demonstrating the increasing willingness of state courts to rest their decisions upon state constitutions as "adequate and independent state grounds," *Herb v. Pitcairn,* 324 U.S. 117, 125, 65 S. Ct. 459, 463, 89 L.Ed. 789, 794

Constitutions and the Protection of Individual Rights", 90 Harv. L. Rev. 489, 491, 495 (1977); Countryman, "The Role of a Bill of Rights in a Modern State Constitution: Why a State Bill of Rights?", 45 Wash. L. Rev. 454, 456-459, 470-474 (1970); Falk, "Foreword—The State Constitution: A More Than 'Adequate' Nonfederal Ground", 61 Cal. L. Rev. 273, 281-285 (1973); Force, "State 'Bills of Rights': A Case of Neglect and the Need for a Renaissance", 3 Valparaiso U.L. Rev. 125, 129, 142-143 (1969); Howard "State Courts and Constitutional Rights in the Day of the Burger Court", 62 Va. L. Rev. 873, 874-877, 910-911 (1976); Howard, "The Supreme Court and Federalism", in *The Courts: The Pendulum of Federalism* 49, 71-76 (Roscoe Pound—American Trial Lawyers Foundation 1979); Paulsen, "State Constitutions, State Courts and First Amendment Freedoms", 4 Vand. L. Rev. 620, 621 (1951); Project Report, "Toward an Activist Role for State Bills of Rights", 8 Harv. C.R.-C.L.L. Rev. 271, 285 (1973).

On numerous occasions our own courts have recognized the New Jersey Constitution to be an alternative and independent source of individual rights. See, *e.g.*, *Smith v. Penta*, 81 N.J. 65, 73-76, 405 A.2d 350 (1979); *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 177, 330 A.2d 1 (1974); *id.* at 193-194, 330 A.2d 1 (Pashman, J., dissenting). Mr. Justice Brennan in his oft-cited piece in 90 Harv. L. Rev., *supra*, at 499 drew support for this proposition from *State v. Johnson*, 68 N.J. 349, 353 n.2, 346 A.2d 66 (1975), wherein Justice Sullivan had observed that although the New Jersey constitutional provision relating to searches and seizures was identical to the federal Fourth Amendment provisions, "'we have the right to construe our State constitutional provision in accordance with what we conceive to be its plain meaning.'"

(1945), has been characterized as a "'phoenix-like resurrection of federalism'". Howard, "The Supreme Court and Federalism," *in The Courts: The Pendulum of Federalism* 49, 72 (Roscoe Pound —American Trial Lawyers Foundation 1979) (quoting Address by Justice Mosk, Bicentennial Conference, New York University School of Law, April 28, 1976); see also Mosk, "The New States' Rights," 10 *Cal. L. Enforcement* 81, 82 (1976).

The guarantees of our State Constitution have been found to extend to a panoply of rights deemed to be most essential to both the quality of individual life and the preservation of personal liberty. See, *e.g.*, *Levine v. Institutions & Agencies Dept. of N.J.*, 84 N.J. 234, 244-249, 258, 418 A.2d 229 (1980) (right to an education); *id.* at 273, 418 A.2d 229 (Pashman, J., dissenting); *State v. Ercolano*, 79 N.J. 25, 30, 34, 397 A.2d 1062 (1979) (privacy-based freedom from "unreasonable searches and seizures"); *State v. Slockbower*, 79 N.J. 1, 4 n.2, 397 A.2d 1050 (1979) (same); *State v. Tropea*, 78 N.J. 309, 313, n.2, 394 A.2d 355 (1978) (double jeopardy and fundamental fairness); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 79, 389 A.2d 465 (1978) (equal protection); *State v. Saunders*, 75 N.J. 200, 216-217, 381 A.2d 333 (1977) (right of sexual privacy); *id.* at 224-225, 381 A.2d 333 (Schreiber, J. concurring); *In re Quinlan*, 70 N.J. 10, 19, 40-41, 51, 355 A.2d 647 (1976), *cert. den. sub nom. Garger v. New Jersey*, 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976) (right of choice to terminate life-support systems as aspect of right of privacy); *State v. Johnson, supra*, 68 N.J. at 353, 346 A.2d 66 (freedom from "unreasonable searches and seizures"); *State v. Gregory*, 66 N.J. 510, 513-514, 333 A.2d 257 (1975) (double jeopardy and fundamental fairness); *Robinson v. Cahill*, 62 N.J. 473, 482, 509, 303 A.2d 273 (1973), *cert. den. sub nom. Dickey v. Robinson*, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973) (*Robinson I*) (right to an education); *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 345-346, 294 A.2d 233 (1972) (right to vote); *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 191, 195-196, 175 A.2d 639 (1961) (right of employees to organize and bargain collectively); *State v. Hannah*, 171 N.J. Super. 325, 330, 408 A.2d 1349 (App. Div. 1979) (right to a public criminal trial inheres in the public); *Freedman v. New Jersey State Police*, 135 N.J. Super. 297, 300-301, 343 A.2d 148 (Law Div. 1975) (freedom of the press); *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297, 306-307, 265 A.2d 404 (Ch. Div. 1970) (right to be free from racial discrimination); *cf. State v. Carpentieri*, 82 N.J. 546, 572-573, 414 A.2d 966 (1980) (Pashman, J., dissenting) (freedom from "unreasonable searches and seizures"). *Contra, Anderson v. Sills*, 143 N.J. Super. 432, 442, 363 A.2d 381 (Ch. Div. 1976). As Justice Schreiber pointed out in his concurring opinion in

State v. Saunders, supra, with respect to fundamental personal rights, "individuals have freedom to think, decide and act as they see fit[; t]his freedom is an aspect of their right of privacy" guaranteed by the New Jersey Constitution, N.J. Const. (1947), Art. I, par. 1, quite apart from the federal Constitution. 75 N.J. at 225, 381 A.2d 333.

Most recently, this Court recognized through Chief Justice Wilentz that freedom of the press, intimately associated with individual expressional and associational rights, is strongly protected under the State Constitution (N.J. Const. (1947), Art. I, par. 6), state statutory enactments (*e.g.*, N.J.S.A. 2A:84A-21 *et seq.* ("shield law")), and state decisional law. See *State* [*v.*] *Boiardo,* 83 N.J. 350, 353, 416 A.2d 793 (1980) (Boiardo II); *State v. Boiardo,* 82 N.J. 446, 458, 414 A.2d 14 (1980) (Boiardo I); *In re Farber,* 78 N.J. 259, 286-287, 394 A.2d 330 (Pashman, J., dissenting). The United States Supreme Court itself has acknowledged that the First Amendment, which implicates this important freedom, does not accord to it the degree of protection that may be available through state law. *Branzburg v. Hayes,* 408 U.S. 665, 706, 92 S.Ct. 2646, 2669, 33 L.Ed.2d 626, 654 (1972); see also, *e.g., Keene Publishing Corp. v. Cheshire County Superior Court, supra; Westchester Rockland Newspapers, Inc. v. Leggett, supra.*

A basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and assembly is found in part in the language employed. Our Constitution affirmatively recognizes these freedoms, *viz.*:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . . . [N.J. Const. (1947), Art. I, par. 6.]
>
> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances. [N.J. Const. (1947), Art. I, par. 18.]

The constitutional pronouncements, more sweeping in scope than the language of the First Amendment,[8] were incorporated into the organic law of this State with the adoption of the 1844 Constitution. N.J. Const. (1844), Art. I, pars. 5 and 18. They were, however, directly derived from earlier sources, *e.g.*, the free speech provision was modeled after Article 7, Section 8 of the 1821 Constitution of the State of New York (now N.Y. Const. (1938), Art. I, § 8). Heckel, "The Bill of Rights" (Monograph), in 2 *Proceedings of the New Jersey Constitutional Convention of 1947*, 1336, 1344 (1951) (hereinafter Heckel, "Bill of Rights"); *id.* at 1357-1358. This early constitutional model itself has been recognized as constituting an independent source of protectable individual rights. See *Cooper v. Morin, supra,* 49 N.Y.2d at 79, 399 N.E.2d at 1194, 424 N.Y.S.2d at 174; *Westchester Rockland Newspapers, Inc. v. Leggett, supra,* 48 N.Y.2d at 436, 442, 399 N.E.2d at 521, 525, 423 N.Y.S.2d at 634, 638; *Sharrock v. Dell Buick-Cadillac, Inc., supra,* 45 N.Y.2d at 160-161, 379 N.E.2d at 1173, 408 N.Y.S.2d at 43-44.

Although our own courts have seldom been invited or required to view the New Jersey Constitution as a separate basis for delineating the scope of individual speech and assembly freedoms, the philosophy recognizing the importance of such rights has been frequently voiced. In a case decided last

---

[8] Even if the language of the state constitutional and federal constitutional provisions were identical, this Court could give differing interpretations to the provisions. This option was noted by Justice Sullivan in *State v. Johnson,* 68 N.J. 349, 353, 346 A.2d 66 (1975). As Justice Mosk of the California Supreme Court has observed, "[i]t is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse." *People v. Brisendine,* 13 Cal.3d 528, 550, 531 P.2d 1099, 1113, 119 *Cal. Rptr.* 315, 329 (S. Ct. 1975); see Note, "Expanding State Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?", 8 *Loyola U.L.J.* 186, 192 (1976); see also Z. Chafee, *Free Speech in the United States* 5-6 (1941).

term dealing with such expressional rights in the context of municipal zoning restrictions, Justice Clifford observed as follows:

> [P]olitical speech . . . occupies a preferred position in our system of constitutionally-protected interests. [*State v. Miller*, 83 N.J. 402, 411, 416 A.2d 821 (1980).] Where political speech is involved, our tradition insists that government "allow the widest room for discussion, the narrowest range for its restriction". [*Id.* at 412, 416 A.2d 821 (citation omitted).]

See *Adams Theatre Co. v. Keenan*, 12 N.J. 267, 277, 96 A.2d 519 (1953) (under the facts, there was a First Amendment violation in the denial of theatre license since "speech[, including the 'performance of play or show' (*id.* at 270, 96 A.2d 519),] is to be presumed to be protected speech and . . . the presumption is not the other way"); *State v. Butterworth*, 104 N.J.L. 579, 582, 142 A. 57 (E. & A. 1928) (in overturning the unlawful assembly convictions of striking workers, Court observed that "[t]hese constitutional mandates [the First Amendment and N.J. Const. (1844), Art. I, par. 18], being in favor of the liberty of the people, must be given the most liberal and comprehensive construction").

Our courts have also on occasion observed that the State Constitution serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. *Smith v. Penta, supra*, 81 N.J. at 74, 405 A.2d 350; *Gangemi v. Berry*, 25 N.J. 1, 8-9, 134 A.2d 1 (1957). Hence, the explicit affirmation of these fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them. See 16A *Am. Jur. 2d, Constitutional Law*, § 439 at 208 (1979). It has been recognized that the State Constitution, as a wellspring of individual rights and liberties, may be directly enforceable, its protections not dependent even upon implementing legislation. *Peper v. Princeton Univ. Bd. of Trustees, supra*, 77 N.J. at 76-77, 389 A.2d 465. "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence . . . ." *King v. South Jersey Nat'l Bank, supra*, 66 N.J. at 177, 330 A.2d 1 (Hughes, C.J.); see *Robinson I, supra*, 62 N.J. at 513, 303 A.2d 273; *Booker v. Plainfield Bd. of Educ.*, 45 N.J. 161, 173-175, 214

A.2d 1 (1965). Furthermore, the State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights. See *In re Quinlan, supra,* 70 N.J. at 19 n.1, 355 A.2d 647; *cf. Mt. Laurel v. Public Advocate of N.J.,* 83 N.J. 522, 535-536, 416 A.2d 886 (1980) (state statute creating Office of Public Advocate to enforce the rights of citizens as an aspect of the public interest is not unconstitutional). This constitutional imperative, applicable to the freedoms of speech and assembly, comports with the presumed intent of those who framed our present Constitution. See Heckel, "Bill of Rights", *supra* at 1344-1345, 1357-1358.

Finally, the rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well. It has been noted that in our interpretation of fundamental State constitutional rights, there are no constraints arising out of principles of federalism.[9] *Robinson I, supra,* 62 N.J. at 490, 303 A.2d 273. See also *King v. South Jersey Nat'l Bank, supra,* 66 N.J. at 192-193, 330 A.2d 1 (Pashman, J., dissenting) (citing *Cooper v. Nutley Sun Printing Co., supra,* 36 N.J. at 196-197, 175 A.2d 639; *Gray v. Serruto Builders, Inc., supra,* 110 N.J. Super. at 306-307, 265 A.2d 404; Countryman, "The Role of a Bill of Rights in a Modern State Constitution", *supra,* 45 Wash. L. Rev. at 473; Project Report, "Toward an Activist Role for State Bills of Rights", *supra* 8 Harv. C.R.-C.L.L. Rev. at 338 (analyzing N.J. Const. (1947), Art. I, par. 6)). Hence, federal requirements concerning "state action", founded primarily in the language of the Fourteenth Amendment and in principles of federal-state relations, do not have the same force when applied to state-based constitutional rights.

---

[9] This point was expressed in dissent by Justice Pashman who stated that "one of the most important functions performed by state constitutional bills of rights which is not performed by the federal constitution is the protection of citizens against private oppression as well as oppression by the state". *King v. South Jersey Nat'l Bank,* 66 N.J. 161, 193, 330 A.2d 1 (1974) (Pashman, J., dissenting) (citations omitted).

It is also clear that while state constitutions may be distinct repositories of fundamental rights independent of the federal Constitution, there nonetheless exist meaningful parallels between the federal Constitution and state constitutions, especially in the areas where constitutional values are shared, such as speech and assembly. Indicative of such mutuality, our State Constitution not only affirmatively guarantees to individuals the rights of speech and assembly, but also expressly prohibits government itself, in a manner analogous to the federal First and Fourteenth Amendments, from unlawfully restraining or abridging "the liberty of speech". N.J. Const. (1947), Art. I, par. 6.

We conclude, therefore, that the State Constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights. These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property. The State Constitution in this fashion serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof.

Against this constitutional backdrop must be addressed the question of whether the State Constitution's guarantees of speech and assembly under Article I, paragraphs 6 and 18 apply to the distribution of political materials by defendant Schmid upon the Princeton University campus on April 5, 1978. This question brings us to the heart of the problem—the need to balance within a constitutional framework legitimate interests in private property with individual freedoms of speech and assembly.

In the comparable federal setting, private property not used by the public or made available for public use does not

ordinarily become subject directly to restrictions in favor of the public. *Hynes v. Oradell,* 425 U.S. 610, 619, 620, 96 S.Ct. 1755, 1760, 48 L. Ed. 2d 243, 252 (1976). Moreover, private property does not "lose its private character merely because the public is generally invited to use it for designated purposes". *Lloyd Corp. v. Tanner, supra,* 407 U.S. at 569, 92 S. Ct. at 2229, 33 L. Ed. 2d at 143. See *PruneYard Shopping Center v. Robins, supra,* U.S. at 100 S. Ct. at 2041, 64 L. Ed. 2d at 752; *Hudgens v. NLRB, supra,* 424 U.S. at 519-520, 96 S. Ct. at 1036, 47 L. Ed. 2d at 206-207. Nevertheless, as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights. *Marsh v. Alabama, supra,* 326 U.S. at 506, 66 S. Ct. at 278, 90 L. Ed. at 268.

There is a parallel under our State Constitution. The state constitutional equipoise between expressional rights and property rights must be similarly gauged on a scale measuring the nature and extent of the public's use of such property. Thus, even as against the exercise of important rights of speech, assembly, petition and the like, private property itself remains protected under due process standards from untoward interference with or confiscatory restrictions upon its reasonable use. *Robins v. PruneYard Shopping Center, supra,* 23 Cal. 3d at 910-911, 592 P.2d at 347-348, 153 Cal. Rptr. at 860-861; see *King v. South Jersey Nat'l Bank, supra,* 66 N.J. at 175, 330 A.2d 1. The constitutional protection of private property against undue interference or "taking" is secured by our own Constitution. N.J. Const. (1947), Art. I, pars. 1 and 20.

On the other hand, it is also clear that private property may be subjected by the state, within constitutional bounds, to reasonable restrictions upon its use in order to serve the public welfare. See, *e.g., Vasquez v. Glassboro Service Ass'n,* 83 N.J. 86, 100-101, 415 A.2d 1156 (1980); *Garrow v. Elizabeth General Hosp. & Dispensary,* 79 N.J. 549, 560-561, 401 A.2d 533 (1979); *Doe v. Bridgeton Hosp. Ass'n,* 71 N.J. 478, 487-488, 366 A.2d 641 (1976), *cert. den.,* 433 U.S. 914, 97 S. Ct. 2987, 53 L. Ed. 2d

1100 (1977); *State v. Shack*, 58 N.J. 297, 305-308, 277 A.2d 369 (1971); *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 395-401, 192 A.2d 817 (1963); *Zelenka v. Benevolent & Protective Order of Elks*, 129 N.J. Super. 379, 386-387, 324 A.2d 35 (App. Div. 1974), *certif. den.*, 66 N.J. 317, 331 A.2d 17 (1974); *cf. State v. Miller, supra*, 83 N.J. at 415, 416 A.2d 821 (1980) (while "preservation of aesthetics and property values is a legitimate end for a municipal zoning ordinance", an ordinance generally prohibiting property owners from placing signs on their property violates the protected First Amendment interests of those property owners). In this regard, the United States Supreme Court has recently acknowledged that

> [i]t is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation . . . . [*PruneYard Shopping Center v. Robins, supra*, U.S. at , 100 S. Ct. at 2040-2041, 64 L. Ed. 2d at 752.]

The California Supreme Court, in the same case, found that such restrictions upon private property could properly be imposed in order to protect the rights of free speech and petition, *viz*:

> To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights. [*Robins v. PruneYard Shopping Center, supra*, 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859.]

We are thus constrained to achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property. In seeking this optimum, we can derive some guidance from certain of the Supreme Court cases, such as *Marsh v. Alabama, supra; Lloyd Corp. v. Tanner, supra*, and *PruneYard Shopping Center v. Robins, supra*, which recognize

generally that the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property. Since it is our State Constitution which we are here expounding, it is also fitting that we look to our own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property. See *Vasquez v. Glassboro Service Ass'n, supra,* 83 N.J. at 100-101, 415 A.2d 1156; *State v. Shack, supra,* 58 N.J. at 305-308, 277 A.2d 369; *Zelenka v. Benevolent & Protective Order of Elks, supra,* 129 N.J. Super. at 386-387, 324 A.2d 35.

Accordingly, we now hold that under the State Constitution, the test to be applied to ascertain the parameters of the rights of speech and assembly upon privately-owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

Even when an owner of private property is constitutionally obligated under such a standard to honor speech and assembly rights of others, private property rights themselves must nonetheless be protected. The owner of such private property, therefore, is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property. It is at this level of analysis—assessing the reasonableness of such restrictions—that weight may be given to whether there exist con-

venient and feasible alternative means to individuals to engage in substantially the same expressional activity. While the presence of such alternatives will not eliminate the constitutional duty, it may lighten the obligations upon the private property owner to accommodate the expressional rights of others and may also serve to condition the content of any regulations governing the time, place, and manner for the exercise of such expressional rights.

Taken together, these are the relevant considerations which must be brought to bear in order to reach an ultimate determination in this case as to the constitutionality of Schmid's trespass conviction for attempting to exercise his rights of speech and assembly upon the Princeton University campus. The record in this appeal is to be assessed in light of the constitutional standard herein set forth.

IV

The application of the appropriate standard in this case must commence with an examination of the primary use of the private property, namely, the campus and facilities of Princeton University. Princeton University itself has furnished the answer to this inquiry in expansively expressing its overriding educational goals, *viz*:

> The central purposes of a University are the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large. Free inquiry and free expression within the academic community are indispensable to the achievement of these goals. The freedom to teach and to learn depends upon the creation of appropriate conditions and opportunities on the campus as a whole as well as in classrooms and lecture halls. All members of the academic community share the responsibility for securing and sustaining the general conditions conducive to this freedom.
>
> . . . . . .

> Free Speech and peaceable assembly are basic requirements of the University as a center for free inquiry and the search for knowledge and insight . . . . [University Regulations, *supra* (1975 as amended 1976).]

No one questions that Princeton University has honored this grand ideal and has in fact dedicated its facilities and property to achieve the educational goals expounded in this compelling statement.

In examining next the extent and nature of a public invitation to use its property, we note that a public presence within Princeton University is entirely consonant with the University's expressed educational mission. Princeton University, as a private institution of higher education, clearly seeks to encourage both a wide and continuous exchange of opinions and ideas and to foster a policy of openness and freedom with respect to the use of its facilities. The commitment of its property, facilities, and resources to educational purposes contemplates substantial public involvement and participation in the academic life of the University. The University itself has endorsed the educational value of an open campus and the full exposure of the college community to the "outside world", *i.e.*, the public at large. Princeton University has indeed invited such public uses of its resources in fulfillment of its broader educational ideals and objectives.[10]

The further question is whether the expressional activities undertaken by the defendant in this case are discordant in any sense with both the private and public uses of the campus and

---

[10] Princeton University in its regulations has dealt extensively with "[c]ommunity use of University resources." Public participation in activities involving the use of University facilities may be by explicit invitation relating to "activities . . . [which] are an integral part of the University's function as an educational institution," by "implicit invitation" as to its grounds and walkways "generally available to the public," by "participation in University-sponsored or sanctioned programs," or by "private invitation" if no other form of invitation is applicable. University Regulations, *supra* note 2 (1975, as amended 1976).

facilities of the University. There is nothing in the record to suggest that Schmid was evicted because the purpose of his activities, distributing political literature, offended the University's educational policies. The reasonable and normal inference thus to be extracted from the record in the instant case is that defendant's attempt to disseminate political material was not incompatible with either Princeton University's professed educational goals or the University's overall use of its property for educational purposes.[11] Further, there is no indication that even under the terms of the University's own regulations, Schmid's activities in any way, directly or demonstrably "disrupt[ed] the regular and essential operations of the University" or that in either the time, the place, or the manner of Schmid's distribution of the political materials, he "significantly infringed on the rights of others" or caused any interference or inconvenience with respect to the normal use of University property and the normal routine and activities of the college community.

---

[11] Supportive of this conclusion is the following excerpt from Princeton University President William G. Bowen in "The Role of the University as an Institution in Confronting External Issues" (January 6, 1978):

> Central to the philosophy of education is the proposition that the University has a responsibility to expose students and faculty members to a wide variety of views on controversial questions . . . .
>
> Put simply, the University's ability to carry out its basic educational mission requires an environment conducive to the maximum possible freedom of thought and expression for each individual student and faculty member. We are not talking, here about something that is merely desirable; we are talking about something that is essential. In this crucial respect, the University has a special role in the society—a special responsibility for creating a milieu in which every individual, whether the steadiest proponent of the majority viewpoint of the loneliest dissenter, is encouraged to think independently.

As noted by Professor Emerson, "freedom of expression is [both] an essential process for advancing knowledge and discovering truth" and "a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." T. Emerson, *The System of Freedom of Expression* 6, 7 (1970).

Without necessarily endorsing any of the foregoing conclusions, the University nevertheless contends that its solicitation regulation was properly invoked against Schmid in this case because it requires that there be a specific invitation from on-campus organizations or students and a specific official authorization before an individual may enter upon University premises even for the purpose of exercising constitutional rights of speech and assembly. It points out that Schmid failed to obtain such permission. The University stresses the necessity for and reasonableness of such a regulation.

In addressing this argument, we must give substantial deference to the importance of institutional integrity and independence. Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. See, *e.g., Healy v. James, supra,* 408 U.S. at 180, 92 S. Ct. at 2345, 33 L. Ed. 2d at 279; *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503, 513-514, 89 S. Ct. 733, 740-741, 21 L. Ed. 2d 731, 741-742 (1969).[12] Hence, private colleges and universities must be accorded a generous measure of autonomy and self-governance if they are to fulfill their paramount role as vehicles of education and enlightenment.

---

[12] The public's right to exercise its freedom of speech does not mandate unrestricted access to university facilities. Even with respect to public property, the public's use of that property for First Amendment activity may be restricted, if not actually prohibited. See, *e.g., Adderley v. Florida,* 385 U.S. 39, 47, 87 S. Ct. 242, 247, 17 L.Ed.2d 149, 155-156 (1966) (public may be prohibited from demonstrating on the grounds of county jail); *American Future Systems, Inc. v. Pennsylvania State Univ.,* 618 F.2d 252, 255 (3 Cir. 1980) (state university regulation forbidding sales demonstrations and solicitation in

In this case, however, the University regulations that were applied to Schmid (in contrast to those subsequently adopted, *supra* at 539-541 n.2, at 617-618 n.2) contained no standards, aside from the requirement for invitation and permission, for governing the actual exercise of expressional freedom. Indeed, there were no standards extant regulating the granting or withholding of such authorization, nor did the regulations deal adequately with the time, place, or manner for individuals to exercise their rights of speech and assembly. Regulations thus devoid of reasonable standards designed to protect both the legitimate interests of the University as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise noninjurious and reasonable exercise of such freedoms. *Cf. Tinker v. Des Moines Indep. Community School Dist., supra,* 393 U.S. at 513, 89 S. Ct. at 740, 21 L. Ed. 2d at 741 (exercise of right of free speech on public school grounds must not interfere with educational mission of the institution); *Cox v. Louisiana,* 379 U.S. 536, 556-558, 85 S. Ct. 453, 465-466, 13 L. Ed. 2d 471, 485-486 (1965) (vague statutes cannot be used to prosecute persons for exercising their First Amendment rights); *Wolin v. Port of New York Auth.,* 392 F.2d 83, 93-94 (2 Cir. 1968), *cert. den.,* 393 U.S. 940, 89 S. Ct. 290, 21 L.Ed. 2d 275 (1968) (public authority may issue reasonable regulations for use of bus terminal for public demonstrations; such regulations should balance right of free expression with public right to use terminal for transportation purposes). In these circumstances, given the absence of adequate reasonable regulations, the required accommodation of Schmid's expressional and associational rights, otherwise reasonably exercised, would not constitute an unconstitutional abridgment of Princeton University's property rights. See *PruneYard Shopping Center v. Robins, supra,* U.S. at

---

university-owned and operated residence halls is constitutional); *Wolin v. Port of New York Auth.,* 392 F.2d 83, 94 (2 Cir. 1968), *cert. den.* 393 U.S. 940, 89 S. Ct. 290, 21 L.Ed.2d 275 (1968) (regulations may limit public's use of public property for expressional activity to ensure that that activity does not intefere with the use to which the property is dedicated).

, 100 S. Ct. at 2041-2042, 64 L. Ed. 2d at 753 (absent any regulations governing expressional activity, such activity reasonably exercised on private property devoted to public use is protectable under state constitution and does not constitute impermissible infringement upon private property rights). It follows that in the absence of a reasonable regulatory scheme, Princeton University did in fact violate defendant's State constitutional rights of expression in evicting him and securing his arrest for distributing political literature upon its campus.

We are mindful that Princeton University's regulatory policies governing the time, place, and manner for the exercise of constitutionally-protected speech and associational rights have been modified substantially since the events surrounding Schmid's arrest and now more fully and adequately define the nature of these restrictions. As we have indicated, the content of such regulations, recognizing and controlling the right to engage in expressional activities, may be molded by the availability of alternative means of communication. *Supra* at 563-564, at 630. These current amended regulations exemplify the approaches open to private educational entities seeking to protect their institutional integrity while at the same time recognizing individual rights of speech and assembly and accommodating the public whose presence nurtures academic inquiry and growth. As noted, however, these regulations were not in place when the University interfered with Schmid's reasonable efforts to communicate his political views to those present on its campus in April 1978. Hence, Schmid suffered a constitutional impairment of his State constitutional rights of speech and assembly and his conviction for trespass must therefore be undone.

Accordingly, for the reasons set forth, the judgment below is reversed.

PASHMAN, J., concurring and dissenting in part.

I concur in the judgment of the Court and in Parts I, III, IV and V of Justice Handler's opinion for the majority. I do not, however, share the majority's views in Part II of the opinion,

which discusses and all but decides whether defendant's conviction for criminal trespass was in violation of the First and Fourteenth Amendments of the United States Constitution. The Court's ruling that the conviction was contrary to Article I, paragraphs 6 and 18 of the New Jersey Constitution renders discussion of the First Amendment unnecessary. Because the majority has nevertheless seen fit to examine in detail the questions arising under the federal Constitution, *see ante* at 542-553, at 618-624, I find the following observations warranted.

The three "shopping center cases" decided by the United States Supreme Court, *Hudgens v. N. L. R. B.*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972); *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968); *see also PruneYard Shopping Center v. Robins*, U.S. , 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), and their intellectual predecessor, *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), might appear upon first examination to establish an alternative means of satisfying the Fourteenth Amendment's requirement of "state action". Indeed, in the Supreme Court's most recent discussion of the concept of "state action", *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L.Ed. 2d 185 (1978), the Court described these earler decisions as "[a] second line of cases under the pulbic-function doctrine", *id.* at 158, 98 S. Ct. at 1734—an exception to the requirement of governmental action where private persons exercise powers "traditionally exclusively reserved to the State", *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S. Ct. 449, 454, 42 L.Ed. 2d 477 (1974). *See Flagg Bros., supra*, 436 U.S. at 157-159, 98 S. Ct. at 1733. Yet the divergent results in these cases cannot be reconciled merely by examining whether "state action" was present. In each case, the enforcement of trespass laws permitted the private owners of a business district to exclude those who would use the property for speech-related activities. None of the "shopping center cases" rested on the state action doctrine as the ground

of decision. These holdings seemed to be concerned with a different question: whether the value of the specific property rights enforced by the state outweighed the harm to the particular First Amendment interest at stake. *See generally* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 Sup. Ct. Rev. 221, 232-236.* The use of the label "state action" may be misleading, for the focus of attention here has been the presence or absence of a substantive constitutional violation.

This view is confirmed by examining the four cases involving First Amendment protection of expressive activity on private property. In the earliest decision, *Marsh v. Alabama, supra,* Justice Black summarized the Court's reversal of a conviction for criminal trespass upon a privately owned "company town" as follows:

> In our view the circumstance that the property rights to the premises where the derprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and *the enforcement of such restraint by the application of a state statute. In so far as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.* [326 U.S. at 509, 66 S. Ct. at 280 (emphasis added)]

While Marsh emphasized the assumption of traditional governmental functions by the owners of the "company town", the Court's holding also focused on the government's direct enforcement of the town's restrictive practices by the imposition of criminal sanctions. The state's decision to protect private property at the expense of expressive activity was constitutionally impermissible. "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." *Id.*

These two themes—the presence of direct governmental involvement in the enforcement of private property rights and the balancing of property and First Amendment rights—also run through the three "shopping center cases". In *Logan Valley, supra,* the Court described the question presented as "whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances to bar petitioners from the [shopping center] premises." *Logan Valley, supra,* 391 U.S. at 315, 88 S. Ct. at 1606. The Court answered in the negative and recognized a constitutional right to engage in expressive activity on private property. *Id.* at 325, 88 S. Ct. at 1612. None of the dissenting members of the Court—including Justice Black, the author of *Marsh*— objected to the result of *Logan Valley* because of an asserted absence of "state action". *See id.* at 327-333, 88 S. Ct. at 1613 (Black, J., dissenting); *id.* at 333-337 (Harlan, J., dissenting); *id.* at 337-340, 88 S. Ct. Ct. at 1618 (White, J., dissenting).

Four years later in *Lloyd Corp., supra,* when the Court "substantially repudiated the rationale of *Logan Valley,*" *Prune Yard Shopping Center, supra,* U.S. at , 100 S. Ct. at 2040, 64 L.Ed.2d at 751, the reason was not the absence of "state action". The Court in *Lloyd Corp.* considered whether the protection of free expression in a shopping center that was unrelated to the center's operations "violates rights of private property protected by the Fifth and Fourteenth Amendments". *Lloyd Corp., supra,* 407 U.S. at 553, 92 S. Ct. at 2221. The Court recognized the importance of the "state action" requirement under the First and Fourteenth Amendments. *See id.* at 567, 92 S. Ct. at 2228. Although it did not address whether the provisions of remedies under the trespass laws, which both *Logan Valley* and *Marsh* cited, met that requirement, the Court noted a pronouncement in *Logan Valley* that implicitly supplied the requisite element of "state action":

> [*T*]*he State may not delegate the power, through the use of its trespass laws,* wholly to exclude those members of the public wishing to exercise their First Amendment rights on

> the premises in a manner and for a purpose generally consonant with the use to which the property is actually put. [*Id.* at 560, 92 S. Ct. at 2224 (quoting *Logan Valley, supra,* 391 U.S. at 319-320, 88 S. Ct. at 1608)(emphasis added)]

Without challenging the soundness of this observation, the Court in *Lloyd Corp.* held "that there ha[d] been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle [the] exercise therein [of] the asserted First Amendment rights." *Lloyd Corp., supra,* 407 U.S. at 570, 92 S. Ct. at 2229. The majority reached this conclusion after balancing the rights in question:

> It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech. [*Id.* at 567, 92 S. Ct. at 2228]

Unlike in *Logan Valley,* therefore, enforcement of property rights imposed no significant bundens on First Amendment rights.

The conflict between *Lloyd Corp.* and *Logan Valley* was resolved by the Court in *Hudgens v. N.L.R.B., supra,* the third of the "shopping center cases". In contending that "the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case," *Hudgens, supra,* 424 U.S. at 518, 96 S. Ct. at 1035, the Court observed generally that the Constitution did not provide protection or redress "against a private corporation or person who seeks to abridge the free expression of others * * *." *Id.* at 513, 96 S. Ct. at 1033. *March v. Alabama, supra,* was an exception to this principle. *Id.* The *Hudgens* Court found the exception was grounded in the absence of any meaningful distinction between the functions of a company town and a conventional municipality. *Id.* at 514, 96 S. Ct. at 1033. The Court did not discuss the the significance of the

State's use of the trespass laws to enforce the company town's restrictions on speech. However, what is equally important for present purposes is that the Court in *Hudgens* did not reject the function of criminal trespass laws in supplying "state action". Instead, the Court found *Lloyd Corp.* and *Logan Valley* irreconcilable and therefore held "that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this". *Id.* at 521, 96 S. Ct. at 1037; *see Prune Yard Shopping Center, supra,* U.S. at , 100 S. Ct. at 2040, 64 L.Ed. 2d at 752.

It thus appears that in the development of First Amendment doctrine from *Marsh* through *Hudgens,* the Supreme Court was principally concerned with the reach of substantive constitutional protection for expressive activity, and not with the limits of the "state action" doctrine. Consistent with the approach of these decisions, I would be inclined to rule that the definition of common-law property rights, and their enforcement against defendant through criminal trespass laws, constitute state action. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 265, 84 S. Ct. 710, 718, 11 L.Ed. 2d 686 (1964); *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948); *King v. South Jersey Nat'l Bank,* 66 N.J. 161, 180-203, 330 A.2d 1 (1974)(Pashman, J., dissenting).

Of course, the presence of state action does not itself spell out a violation of First Amendment rights; it is merely the premise for substantive constitutional inquiry. Because *Logan Valley, Lloyd Corp.* and *Hudgens* focus on the federal Constitution's safeguard of free speech against judicial enforcement of private property rights, the First Amendment issue before us is not whether Princeton University is a "company town", see *Marsh v. Alabama, supra.* Looking instead to *Lloyd Corp.* as the guiding precedent, we would consider whether the value of the university's property rights outweighs the harm to defendant's expressive rights. The crucial factor in this inquiry is whether there has been "such dedication of" Princeton University "to public use as to entitle [the] exercise therein [of] First Amendment rights", *Lloyd Corp., supra,* 407 U.S. at 570, 92 S.

Ct. at 2229. The non-profit, educational, and indeed public purposes of the university would then assume special relevance.

In *dictum* wholly unnecessary to the Court's judgment, the majority states that the existence of what it considers to be adequate "alternative means of communication" would deprive defendant of a First Amendment right to engage in expressive activity at the university. *Ante* at 551, at 623. It relies on *Lloyd Corp.* for its apparent view that the absence of an adequate alternative forum is an absolute prerequisite for federal constitutional protection. Even assuming this to be so, I do not believe the majority has properly addressed whether defendant could adequately deliver his message from public property to students residing on the university campus. A shopping center has no residents; thus a location on public property near an entrance to the center permits full access to its incoming patrons. *See Lloyd Corp., supra,* 407 U.S. at 566-567, 92 S. Ct. at 2227. A predominantly residential institution like Princeton University presents different problems of access that are not so easily resolved. *Cf. State v. Shack,* 58 N.J. 297, 277 A.2d 369 (1971) (ownership of real property does not include the right to bar access to governmental services available to migrant workers residing on the property by invoking the trespass laws). Sites outside the campus or on the fortuitously located public street running through it may not provide an adequate forum for communicating with the residents of the university. The present record describes the location and physical plant of the university but not the traffic patterns of its residents. *See ante* at 551, at 623. It can support a judgment about access to lifeless buildings but not one about access to people. Even if the absence of an adequate alternative forum were a crucial requirement, the majority's summary analysis does not warrant the conclusion that defendant receives no protection from the First Amendment.

Furthermore, I would accord less significance to the presence of an adequate alternative forum than does the majority. It is true that in *Lloyd Corp.* the Court distinguished the facts before it from those in *Logan Valley* on two grounds: that the

expressive activity was unrelated to the operations of the shopping center, *see Lloyd Corp., supra,* 407 U.S. at 564-565, 92 S. Ct. at 2226, and that "adequate alternative avenues of communication exist[ed]", *id.* at 567, 92 S. Ct. at 2228. But in *Hudgens* the Court repudiated these distinctions as constitutionally insignificant. *See Hudgens, supra,* 424 U.S. at 518-519, 96 S. Ct. at 1035. The Court expressly rejected any approach to the First Amendment that would resolve rights of free speech within a shopping center by reference to the speech's content. *Id.* at 520, 96 S. Ct. at 1036. Addressing the existence of alternative means of communication in *Lloyd Corp.*, the Court noted in *Hudgens* that "the [shopping center] in *Lloyd* more closely resembled the business section in Chickasaw, Ala."—the "company town" of *Marsh*—than the center in *Logan Valley. Id.* at 518 n.5, 96 S. Ct. at 1035 n.5. The dispositive factor in *Lloyd Corp.* that survived the criticism of *Hudgens* was the absence of "such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents therein the asserted First Amendment rights". *Lloyd Corp., supra,* 407 U.S. at 570, 92 S. Ct. at 2229. Contrary to the majority, I believe this ruling expresses the primary criterion for determining whether the First Amendment afforded defendant a right to engage in expressive activity on the grounds of the university. This factor is crucial because it determines whether interests in private property outweigh the harm to defendant's right to free speech.

As I have said, there is no need to resolve this issue—or to discuss it gratuitously—for we have decided that defendant's conviciton for trespass offends the State Constitution. I feel compelled to write only because the majority has expressed what I believe is a restrictive view of the first guarantee in our Bill of Rights. Certainly, the contrast between that view and the Court's State constitutional ruling is difficult to explain. Since I believe the contrast is as unjustified as it is unnecessary, I do not join in Part II of the majority's opinion. I concur, however, in both the judgment of the Court and the balance of my Brother Handler's opinion.

SCHREIBER, J., concurring.

I join in the conclusion reached today by the majority that the judgment of conviction be reversed. However, I am not in accord with the majority's analysis of the United States Supreme Court's opinions concerning the First Amendment and believe that under its decisions the First Amendment (via the Fourteenth Amendment) has not been violated. Moreover, I would hold that Princeton University's obligation under Article I, par. 6 of the New Jersey Constitution depends upon its dedication to the public of its property.[1]

For Schmid to succeed under the First and Fourteenth Amendments he must establish that the actions taken by Princeton University constituted state action. After discussing several theories and rationales and concluding that their application does not constitute state action, *ante* at 544-549, 619-622, the majority seems to say that the holding in *Marsh v. Alabama*, 326 U.S. 601, 66 S. Ct. 276, 90 L.Ed. 265 (1966), may justify a finding of state action under the facts in this case. I do not agree. *Marsh v. Alabama*, must be considered in the light of three succeeding opinions of the United States Supreme Court, *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L.Ed. 2d 603 (1968); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L.Ed.2d 131 (1972), and *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029, 47 L.Ed.2d 196 (1976).[2]

---

[1] It is not clear whether the majority is relying upon a balancing process, *ante* at 560-561, at 628-629, or is in effect advocating the same principle suggested herein. Compare *ante* at 564-566, at 630-632 with *infra* at 639, at 618.

[2] In *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed.1161 (1948), the Supreme Court held that judicial enforcement of a racially restrictive covenant governing a private sale of land constituted state action. Despite ample opportunity to apply the *Shelley* rationale, the Supreme Court has not found that mere prosecution and conviction under a criminal trespass statute furnishes the necessary state action. *See Peterson v.Greenville*, 373 U.S. 244, 83 S. Ct. 1119, 10 L.Ed.2d 323 (1963); *Lombard v. Louisiana*, 373 U.S. 267, 83 S. Ct. 1122, 10 L.Ed.2d 338 (1963); *Robinson v. Florida*, 378 U.S. 153, 84 S. Ct. 1693, 12

In *Marsh*, the Supreme Court held that the First and Fourteenth Amendments protected the exercise of free speech in a company-owned town which was open to the public generally. The sole distinguishing characteristic of this town was that title to all the property was vested in a private corporation. Justice Black, writing for the majority, reasoned that "[t]he more an owner, for his advantage, opens up his property to use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. at 506, 66 S. Ct. at 278, 90 L.Ed. at 268. He held that people who lived in a municipality were not to be denied freedom of press and religion simply because a private company holds legal title to all the town. Hence, a Jehovah's Witness who distributed religious literature on the "public" sidewalk against the private owner's wishes could not be convicted of criminal trespass.

In *Logan Valley*, the Supreme Court extended the *Marsh* rationale to provide First Amendment protections for union members picketing a store on shopping center property. It held that the shopping center was "the functional equivalent of a 'business block'" and must be treated in substantially the same manner as the business district in a company town. *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. at 325, 88 S. Ct. at 1612, 20 L.Ed.2d at 616. Significantly, Justice Black, author of the *Marsh* opinion, dissented. He wrote that "*Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores,

---

L.Ed.2d 771 (1964); *Bell v. Maryland*, 378 U.S. 226, 84 S. Ct. 1814, 12 L.Ed.2d 822 (1964). Moreover, the *Marsh* line of cases did not rely upon enforcement of state trespass statutes. Only Justice Marshall has interpreted these cases to hold that state action existed because of trespass actions. *PruneYard Shopping Center v. Robins*, U.S. , , 100 S. Ct. 2035, 2045, 64 L.Ed.2d 741 758 (1980) (Marshall, J., concurring). *See also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-163, 98 S. Ct. 1729, 1734, 56 L.Ed.2d 185, 195-197 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-354, 95 S. Ct. 449, 454, 42 L.Ed.2d 477, 485-486 (1974).

residences, and everything else that goes to make a town." *Id.* at 330, 88 S. Ct. at 1615, 20 L.Ed.2d at 619 (Black, J., dissenting).

Four years later the Supreme Court reconsidered and distinguished *Logan Valley* in *Lloyd Corp. v. Tanner.* The Court held that persons distributing handbills protesting the Vietnam War in a private shopping center were not protected by the First and Fourteenth Amendments and were, therefore, subject to prosecution for criminal trespass. In its opinion the Court described the *Marsh* holding in the following manner: "In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State." *Lloyd Corp. v. Tanner,* 407 U.S. at 569, 92 S. Ct. at 2229, 33 L.Ed.2d at 143. The Court distinguished *Logan Valley* by limiting its application to situations in which two factors exist. First, the expression sought to be protected must be related to the use of the private property. Second, there must be no other reasonable opportunity available to the person claiming protection for conveying his message to his intended audience. *Id.* at 563, 92 S. Ct. at 226, 33 L.Ed.2d at 140.

In *Hudgens v. NLRB,* the Supreme Court in an opinion by Justice Stewart held that striking wharehouse employees did not have a First Amendment right to enter a private shopping center to picket a retail outlet. In determining whether the expression was constitutionally protected, the Court did not apply the two elements discussed in *Lloyd.* Instead, it concluded that despite efforts in *Lloyd* to distinguish *Logan Valley,* " the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case." *Hudgens v. NLRB,* 424 U.S. at 518, 96 S. Ct. at 1036, 47 L.Ed.2d at 206. *See Prune Yard Shopping Center v. Robins,* U.S. , 100 S. Ct. 2035, 2039, 64 L.Ed.2d 741, 751-752 (1980). Justice Stewart commenced with the premise that the right of free speech is constitutionally guaranteed against abridgment by only the federal or state governments—and that an exception to this truism was *Marsh*—where the company town was the functional equivalent of a municipality. He quoted approvingly from Justice

Black's dissent in *Logan Valley* that the shopping center was not the equivalent of a town. He concluded that, if the shopping center "is the functional equivalent of a municipality," then constitutional protections of the First and Fourteenth Amendments would apply. *Id.*, 424 U.S. at 520, 96 S. Ct. at 1036, 47 L.Ed.2d at 207.

The rationale advanced in *Hudgens*, relying as it does on *Marsh* and Justice Black's dissent in *Logan Valley*, clearly indicates that the characteristics relied upon in *Lloyd* to distinguish *Logan Valley*, namely, related expression and no alternative access, are not relevant. Since *Hudgens* states that *Logan Valley* was not sound, the reasons given in *Lloyd* to distinguish *Logan Valley* cease to be significant. Thus, the presence of speech related to the particular enterprise and the absence of an adequate alternative to presentation of that speech are not determinants of the existence or nonexistence of state action.

Neither *Lloyd* nor *Hudgens* purports to overrule *Marsh*. In fact, they expressly affirm its rationale. However, these decisions make it clear that *Marsh* is not to be given an expansive reading. Private property must possess all the attributes of or be the equivalent of a state-created municipality before it stands in the shoes of the State for First and Fourteenth Amendment purposes. *Lloyd Corp. v. Tanner*, 407 U.S. at 569, 92 S. Ct. at 2229, 33 L.Ed.2d at 143; *Hudgens v. NLRB*, 425 U.S. at 513-522, 96 S. Ct. at 1033-1037, 47 L.Ed.2d at 202-207.

Princeton University is not the functional equivalent of a company town as that term has been construed by the Supreme Court. Its main function is to support an academic community. In doing so, it provides services, such as dormitories, eating facilities, and a security force, which can fairly be classified as "attributes of a state-created municipality". But the present United States Supreme Court decisions require that *all* of the "attributes" be assumed by the private enterprise. *Lloyd Corp. v. Tanner*, 407 U.S. at 569, 92 S. Ct. at 2229, 33 L.Ed.2d at 143. Because of its primary role as an educational institution,

Princeton University lacks a number of important attributes which municipalities typically possess. For example, there is no suggestion in the record that Princeton University's campus has either a commercial district, an elementary or secondary school system, a fire department or a sewage disposal plant. Since Princeton University does not fit within the *Marsh* rationale, its efforts to restrain Schmid's distribution of political literature do not constitute state action. Consequently, the criminal prosecution brought to enforce Princeton's legal rights was not in violation of Schmid's First and Fourteenth Amendment rights.

I agree with the majority that Princeton University under the circumstances here is subject to the free speech strictures of the State Constitution.[3] Unlike its counterpart in the Federal Constitution, the New Jersey constitutional guaranty of free speech is not circumscribed by the need to find state action. However, a countervailing precept in the New Jersey Constitution is the owner's right to possess and protect property. *N.J. Const.* (1947), Art. I, par. 1. In harmonizing these seemingly inconsistent rights, it would appear appropriate to subordinate the property owner's rights to the more fundamental concept of the right of free speech when the owner has dedicated its property for a public use involving public discussion.[4] *See Robinson v. Cahill,* 62 N.J. 473, 491, 303 A.2d 273 (1973), where Chief Justice Weintraub commented that the constitutional right to acquire and hold property is not a likely candidate for preferred treatment as a fundamental right.

An analogous situation may be found in *Doe v. Bridgeton Hospital Ass'n,* 71 N.J. 478, 366 A.2d 641 (1976), in which a woman's right to an abortion conflicted with a hospital's policy

---

[3] Article I, par. 6 of the New Jersey Constitution (1947) states:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . .

[4] This case is to be distinguished from the exercise by the State of its general police power impacting on private property interests for public good.

to prevent the use of its property for that purpose. This Court held that the non-sectarian, non-profit hospital which held out the use of its facilities to the general public assumed quasi-public obligations akin to those assumed by common carriers and innkeepers at common law. Accordingly, the hospital, having the facilities and manpower to perform abortions, could not refuse, on moral grounds, to permit use of its facilities to perform an elective abortion.

The nature and extent of the property owner's holding out or dedication of his property for public use determine what, if any, public function has been undertaken. The scope of the constitutional restraints inherent in that public function may then be ascertained. Obviously there must be a nexus between the purpose of the property owner's dedication and the purpose of the public's use. Thus in *Doe* the holding out of the hospital facility for use in a medical capacity would not justify the exercise of a constitutional right to use the hospital as a political forum. Finally, the public's exercise of its constitutional right is subject to the property owner's regulations governing time, place and manner. The reasonableness of such regulations depends upon many factors including alternative means which the public may have available to exercise that constitutional right.

As the majority indicates, Princeton has made its campus available as a forum for an open and robust exchange of political ideas and opinions by both the Princeton community and the public generally. In fact, the University has acknowledged that this type of public debate lies at the core of its intellectual academic life. Such a commitment of its facilities and property constitutes a holding out of this property for a public use. As such Princeton has assumed a public function. Since Schmid's political expression is consistent with the achievement of Princeton's goals, he is entitled to the protection of the right of free speech guaranteed by the New Jersey Constitution.

Moreover, Princeton University's independence, an element which in many respects is essential in the private acade-

mic world, is not thwarted by the State's protection of free speech. It is not a threat to or intrusion upon that independence. Rather, as Justice Handler has cogently pointed out, protection of the public's right to political speech accords with Princeton's fundamental philosophy of open debate. It is precisely for that reason Princeton is subject to the State's interest.

SCHREIBER, J., concurring in the result.

PASHMAN, J., concurring in part and dissenting in part.

For reversal—Chief Justice WILENTZ and Justices SULLIVAN, PASHMAN, CLIFFORD, SCHREIBER, HANDLER and POLLOCK-7.

For affirmance—None.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL
MERCER COUNTY

STATE OF NEW JERSEY

vs

CHRIS A. SCHMID

ORDER ADJUDGING DEFENDANT GUILTY OF VIOLATING *NJSA* 2A:170-31

This appeal from the Municipal Court of the Borough of Princeton was heard in a trial de novo upon a Stipulation of Facts before the Honorable George Y. Schoch, A.J.S.C. sitting without a jury, Jerrold Kamensky, Esquire appearing for defendant, with Sandford Levinson, Esquire admitted pro hoc hac vice, and Robert A. Farkas, First Assistant Prosecutor, appearing on behalf of the State, and the Court having accepted the Stipulation of Facts submitted by the parties and having considered the briefs submitted and the oral argument;

It is on this 20 day of February, 1979 ORDERED AND ADJUDGED that the defendant, Chris A. Schmid, is found guilty of a violation of *NJS* 2A:170-31 and that a fine of $15 and costs of $10 be imposed.

IT IS FURTHER ORDERED that upon the application of the defendant, the payment of said fine and costs shall be stayed pending an appeal to the Superior Court, Appellate Division, which said appeal will be filed by the defendant upon representation of counsel.

/s/ GEORGE Y. SCHOCH
GEORGE Y. SCHOCH, A.J.S.C.

MUNICIPAL COURT OF THE
BOROUGH OF PRINCETON
DOCKET NO. SC53264

STATE OF NEW JERSEY,

Plaintiff,

vs.

CHRIS SCHMID and STEPHEN KOMM,

Defendants.

Decided October 30, 1978.

CARCHMAN, J.M.C.

Defendants Schmid and Komm* were charged with violations of *N.J.S.A.* 2A:170-31 as trespassers on property of Princeton University. The parties have stipulated the facts as follows:

1. Chris Schmid and Stephen Komm, both members of the United States Labor Party were arrested on April 5, 1978, and charged as disorderly persons with violation of New Jersey's general trespass law, *N.J.S.A.* 2A:170-31, while distributing material of the Party (including material offered for purchase) on the grounds of Princeton University, a private not-for-profit educational institution located in Princeton, New Jersey.

2. The U.S. Labor Party, among its other activities, regularly runs candidates for local, state and Federal offices. Some of the material passed out on April 5, 1978, related to the candidacy of a Party member for the office of Mayor of Newark. Other material distributed included general Party literature concerning public issues.

3. Princeton University allows distribution of political materials by any member of the University community. In order for non-University connected persons to distribute material or solicit contributions on campus, permission must be obtained from the Office of the Dean of Student Affairs in the case of the Main Campus of the University, the Office of the

* At trial, the State moved to dismiss the charges against Defendant Komm, which motion was granted.

Director of the Plasma Physics Laboratory in the case of Forrestal Campus, and the Office of the Dean of the Graduate School in the case of the Graduate College.

4. On previous occasions, permission had been sought by non-University members of the U.S. Labor Party without invitations and had been denied. Permission had not been sought immediately prior to the incident on April 5.

5. Prior to his April 5 arrest, defendant Schmid had actual notice of Princeton's policy of refusing to allow persons not connected with the University to enter campus uninvited and without sponsorship for the purpose of soliciting support or contributions, and had been told on at least one occasion on February 15, 1978, that such activity on his part was forbidden and that he was subject to arrest for trespassing if he entered on campus to solicit again. Said notice was through a University proctor (2/15/78).

6. The guidelines for community use of University resources are set out at pp. 67-70 of the 1977-78 edition of *Rights, Rules, Responsibilities: Guidelines for Students,* . . . . The policy on solicitation is set out at page 24 of the same publication. [See copy of page 24 attached as Appendix A]

7. Among the attributes of Princeton University and its student body are the following:

A. Princeton University has two campuses, the main campus and the Forrestal campus, that are separated by a distance of several miles. The Forrestal campus is located in the Township of Plainsboro. The main campus is located partly in the Borough of Princeton and partly in the Township of Princeton. The main campus is bisected by Washington Road, which is a public street. The sidewalks adjacent to Washington Road are located in the public right of way, and, as such, have the same characteristics as any other public sidewalks.

B. Princeton University shares with the Borough and Township of Princeton the costs of the Joint Sewer Operating Committee and of the incinerator. The University purchases its

electricity commercially from Public Service Gas and Electric Company. The University purchases fuel commercially to run its heating plan.

C. Princeton offers undergraduate programs leading to the Bachelor of Arts and Bachelor of Science in Engineering degrees. The program of study for the degree of Bachelor of Arts is described at pages 25-30 of the 1977-78 *Princeton University Undergraduate Announcement*. Undergraduates in the Bachelor of Arts program must complete two one-term course in each of four general areas: Science; Social Science; Arts and Letters; and History, Philosophy, Religion. In general, courses fall into distribution areas according to the departments by which they are offered. The departments in each area are listed below:

Area I, Science

Biology
Chemistry*
Engineering and Applied Science*
Geological and Geophysical Sciences*
Physics*
Psychology*

Area II, Social Science

Anthropology*
Economics
Politics*
Psychology*
Sociology*
Statistics*

Area III, Arts and Letters

Architecture and Urban Planning
Art and Archaeology
Creative Writing*
English

Languages and literature, ancient and modern including literature in translation (excluding 100-level foreign language courses)
Music
Theatre and Dance*
Visual Arts*

Area IV, History, Philosophy, Religion

Classics
East Asian Studies (excluding 100-level foreign language courses)
History
Mathematics*
Near Eastern Studies (excluding 100-level foreign language courses)
Philosophy
Religion
Statistics*

The departmental offices of those departments marked with an asterisk above are located in buildings that are across Washington Road from the central campus (that part of the Main Campus bounded by Nassau Street, University Place, Washington Road and Faculty Road). The majority of classes in other departments are located in the central campus.

The program of study for the Bachelor of Science in Engineering is described at pages 347-350 of the 1977-78 *Princeton University Undergraduate Announcement.* There are no distribution requirements and students concentrate their efforts in the sciences.

All engineering courses and math courses and most science courses are offered in classrooms in buildings across Washington Road from the central campus. In particular, the Engineering Quadrangle is several blocks from the central campus.

D. Approximately 3,725 (83%) undergraduate students live in dormitories or other housing located on that part of the campus of Princeton University bounded by Nassau, Univer-

sity, and Washington Streets, and Faculty Road (hereinafter referred to as the central campus). Approximately 475 (11%) undergraduate students live in Princeton Inn College or at 2 Dickinson Street, both of which are across University Place and Alexander Road from the central campus. About 266 (6%) undergraduate students live in housing off campus.

E. Approximately 525 (36%) graduate students are housed at the Graduate College (including the annexes) located on College Road across University Place and Alexander Street from the central campus. Approximately 165 (11%) graduate students are housed in Lawrence Court Apartments located across Faculty Road and Alexander Street from the central campus. Approximately 250 (17%) more graduate students are housed in apartments on the Butler tract located across Washington Road and Harrison Street about one mile from the central campus. These students represent a total of about 64% of the graduate students and about 15% of the total students enrolled at the University.

F. All members of the first and second year undergraduate classes are required to hold a meal contract at a University owned dining facility. Few exceptions are made to this rule (*e.g.*, 2 of 2,218 in 1977-78). Approximately 1,672 (75%) of these students eat at facilities located on the central campus (Commons, Wilcox Hall in Wilson College, the Student Center or the New South Cafeteria). About 366 (17%) of first and second year students eat at Princeton Inn College located across University Place and Alexander Road from the central campus and another 178 (8%) of these students eat at Stevenson Hall located on Prospect Street across Washington Road. Meal transfers among University facilities are easily obtained and frequently used.

G. Of the undergraduate students in their third and fourth years at the University, approximately 1,354 (60%) have contracts to eat in dining facilities located across Washington Road on Prospect Street either at private eating clubs (which are independent of the University and over which the University

has no direct control) (1,235, 55%) or at Stevenson Hall (119, 5%). Another 248 (11%) have contracts to eat at Wilcox Hall, Commons, New South or the Student Center, all located on the central campus. About 69 students (3%) eat at Princeton Inn College located across University Place and Alexander Road from the central campus. Finally, 567 (25%) of upperclass students are "independent", that is, they have no dining contracts and must purchase and/or prepare food on their own—either in dormitories or apartments where they live or in restaurants or food stores in the surrounding community. Meal transfers between University facilities and the private eating clubs may be obtained and are frequently used.

H. Very few graduate students have contracts to eat at dining facilities on the central campus. About 443 (31%) have meal contracts at the Graduate College and the rest are, for the most part, "independent".

I. Approximately 87% of the student body are citizens of the United States, 18 or over, and therefore eligible to register to vote under the laws of New Jersey or some other state. Approximately 1,500 students are registered to vote in the Borough or Township of Princeton. All of the polling places in the Borough and Township are located off-campus.

J. Religious services for students of various denominations are regularly held at the University Chapel and at the Murray-Dodge Building, both located on the central campus. In addition, services for Orthodox Jewish students are held at Stevenson Hall located on Prospect Street across Washington Road, and services for Roman Catholic students are held at the Aquinas Foundation located on Stockton Street, across University Place and Nassau Street. Students also attend religious services at churches and synagogues throughout the Princeton community.

K. Recreational facilities are located in Dillon Gymnasium and the Baker Hockey Rink, located on the central campus, and in Jadwin Gymnasium located across Washington Road. There are, in addition, outdoor tennis courts located on

the central campus. The football stadium and baseball field are located across Washington Road from the central campus. Athletic practice fields are located both on the central campus and across Washington Road. Lake Carnegie, site of ice skating in winter and sailing and crew races in the spring and fall, is located across Faculty Road from the main campus.

L. The main library is located on the central campus. The Seeley G. Mudd Manuscript Library, the Chemistry, Engineering, Psychology, Population Research and Public and International Affairs libraries are not on the central campus.

M. The Computer Center is located at 85 Prospect Street across Washington Road from the central campus.

N. The administrative offices of the University are located on the central campus. Included among them are the Offices of the Deans of the College, the Graduate College and Student Affairs. Personnel in these offices provide academic and personal counseling to students, and they are responsible for student discipline as well.

O. Princeton University Store is a general department store selling books, records, clothes, radio and television sets, school supplies, cameras, sports equipment, personal hygiene supplies and packaged snack-type food. It also includes a check-cashing facility for the use of students. There are two entrances into the store, one on University Place, the other from the interior of the central campus. The University Store is separately incorporated in the State of New Jersey and is governed by a board of trustees elected in part by the student body.

P. Primary medical care, including psychological counselling, is available at McCosh Infirmary, located on the central campus. Prescription drugs are supplied primarily by drug stores in the local community. Surgical procedures and major medical care is provided through a community hospital.

Q. Daily news coverage is provided the University community by *The Daily Princetonian* and radio station WPRB,

both of which have their offices on the central campus. Both *The Daily Princetonian* and WPRB are separately incorporated and governed by boards of trustees that are completely independent of the University. In addition, the student newspaper agency delivers a number of papers in dormitory rooms including *The New York Times* and the *Washington Post.*

R. Laundry facilities are available in dormitories. In addition, students use laundry facilities located in the community. Dry cleaning services are only available at local commercial establishments.

S. A student "pub" located in the Student Center and the Cafe located in Murray-Dodge provide students with facilities and refreshment, including beer and wine by the glass, for evening relaxation. Packaged liquor must be purchased from commercial establishments off-campus.

T. Students who have their hair cut or styled professionally must do so off-campus. There are no barbers or hair stylists on campus.

U. United States mail is delivered to student dormitories, either by employees of the U. S. Postal Service or of Princeton University. There are mailboxes on the central campus, but stamps must be purchased and packages weighed and mailed at the post office across Nassau Street on Palmer Square.

V. Banking services other than check cashing must be obtained from banks located off-campus.

W. Security for residents of the Princeton University community is provided primarily by the University Security Department, many of whose employees are deputized to make arrests under the laws of New Jersey.

X. The University Art Museum is located on the central campus. A limited selection of art-related books and other materials, including postcards and calendars, are available for purchase at the museum.

Y. The McCarter film series during 1977-78 was held at 10 McCosh Hall, on the central campus. Other film series include that of the Whig-Clio Society, also held on the central campus and the Film Society held at Kresge Auditorium in Frick Lab across Washington Road from the central campus. Most extracurricular lectures open to the community are held on the central campus but a number are held every year at the Woodrow Wilson School auditorium which is across Washington Road from the central campus. Two commercial theatres in the Princeton community, as well as other theatres in surrounding communities, are frequently patronized by students.

Z. Concerts are given on the central campus throughout the year by the Princeton University Orchestra, Band, Glee Club, Freshman [sic] Singers, Opera Theatre, and Musica Alta. There are also a concert series and other musical, film and theatre events offered at McCarter Theatre across University Place from the central campus. The McCarter Theatre Company is separately incorporated and is run by an independent board of trustees.

AA. On the central campus, plays are produced by Theatre Intime at Murray-Dodge Hall and by Wilson College at Wilcox Hall. The Acting Ensemble mounts its productions at 185 Nassau Street, the McCarter Theatre Company puts on about six plays each year at McCarter Theatre, the Triangle Club presents its annual show at McCarter Theatre, and Princeton Inn College offers a number of productions at the Princeton Inn College Theatre—all of these facilities are located off the central campus.

BB. A statement of the "institutional purpose" of Princeton University is contained in "The Role of the University as an Institution in Confronting External Issues", by President William G. Bowen, January 6, 1978, . . ., where President Bowen writes as follows:

> "Central to the philosophy of education is the proposition that the University has a responsibility to expose

students and faculty members to a wide variety of views on controversial questions . . . .

> "Put simply, the University's ability to carry out its basic educational mission requires an environment conducive to the maximum possible freedom of thought and expression for each individual student and faculty member. We are not talking here about something that is merely desireable; we are talking about something that is essential. In this crucial respect, the University has a special role in the society—a special responsibility for creating a milieu in which every individual, whether the steadiest proponent of the majority viewpoint or the loneliest dissenter, is encouraged to think independently."

The University affirms "the fundamental importance of maintaining an atmosphere of maximum freedom and intellectual diversity for the benefit of all who study and learn within it".

8. Princeton University has no fire fighting equipment and it relies on the municipal fire departments for fire protection. In addition, the University relies on the Princeton Rescue Squad for emergency services.

9. As demonstrated by the 1977-78 academic calendar, Princeton holds no summer school session. Student room use contracts begin with the start of classes and expire on the last day of exams each spring (or, in the case of seniors, on graduation day). Very few undergraduate students contract for the use of rooms during the summer.

10. Virtually all of the University's employees—faculty administrators, librarians, technicians, research staff and other supporting staffs—have residences off campus from which they come and to which they return daily.

11. There is no requirement that graduate students live on campus, and the on-campus housing available is insufficient to meet the demand for graduate student housing that exists.

12. Undergraduate students may not live "off campus" without permission from the Dean of Student Affairs. Such permission is routinely granted without inquiry to juniors and seniors. In special circumstances, first and second year students may also obtain permission to reside off campus (*e.g.*, students living at home who wish to commute). Each year about 5% of the student body obtains permission to live off campus. The remaining 95% of the student body resides on campus.

13. The Princeton University Store is open from 9 a.m. to 5:30 p.m. six days a week.

14. With the exception of Baker Rink, and all parking lots, the property and buildings on the central campus are tax exempt. The Princeton University Store pays property taxes on the property it has leased from the University which is located on the central campus.

The novel issue presented is whether *N.J.S.A.* 2A:170-31 can be used to impose criminal sanctions on persons engaged in activity while on the grounds of a private residential university when such activity, if conducted on public property, would be protected by the First and Fourteenth Amendments to the United States Constitution.

The statement of the issue incorporates a concept which neither the State nor the defendants dispute—the activity engaged in by the defendants is activity which if conducted on public property would be protected by the First and Fourteenth Amendments. *Lovell v. Griffin*, 303 U.S. 44 (1938); *Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Jamison v. Texas*, 318 U.S. 413 (1943); *Saia v. New York*, 334 U.S. 558 (1948). It is axiomatic that the free expression of political views in a public forum is as fundamental as any right as any contained in the Constitution of the United States.

The defendants' urge that the unique nature of Princeton University is such as to preclude it from having the benefit of

trespass laws (*N.J.S.A.* 2A:170-31) to restrict protected activity, notwithstanding the fact that it is conceded that the University is "private property". The basis of this assertion is the defendants' reliance on the "company town" doctrine as established in *Marsh v. Alabama*, 326 U.S. 501 (1946).

In *Marsh* the defendant was charged with trespassing while distributing religious literature on the premises of a community which was wholly owned by the Gulf Shipbuilding Corporation. As the Court noted at 326 U.S. 502, 503:

> . . . Except for that [private ownership] it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which cannot be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center

except the fact that the title to the property belongs to a private corporation.

The Court recognized that if not for the title being in the Corporation, and assuming title in a municipal corporation, the defendants' conviction for trespass could not have stood and would have been reversed. 326 U.S. at 504. The Court noted also at 507, 508 the following:

> . . . Whether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

It is patently clear from the Court's decision in *Marsh* that the Court would not allow the sole issue of title to property to govern in a situation where fundamental First and Fourteenth Amendment rights were in dispute and where the isolation and restrictions on the dissemination of information and ideas would be circumvented or curtailed merely by a property right which fictionalized the governmental structure from what would be commonly be considered a public community.

The *Marsh* doctrine became the basis for the next significant "company town" decision in *Amalgamated Food Employees v. Logan Valley Plaza,* 391 U.S. 308 (1968). In *Logan Valley* the Supreme Court reversed a conviction of trespass against

defendants who had been picketing a business enterprise in a "large, newly developed shopping center".

In *Logan Valley*, the Court noted that *Marsh* appeared to deal with the narrow question of distributing leaflets in a "business district" and relying on that rather narrow view of *Marsh* found there was little distinction between the shopping center described in *Logan Valley* and the business district described in *Marsh*. The Court noted further that the defendant's union picketing was limited to one establishment in the shopping center and directly related to the activities of the shopping center.

A most striking aspect of the *Logan Valley* decision can be found in the dissent of Justice Black, the author of *Marsh*. Justice Black noted at 391 U.S. 330-332:

> In affirming petitioners' contentions the majority opinion relies on *Marsh v. Alabama*, supra, and holds that respondents' property has been transformed to some type of public property. But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town. The particular company town involved was Chickasaw, Alabama, which, as we stated in the opinion except for the fact that it 'is owned by the Gulf Shipbuilding Corporation . . . has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated.' 326 U.S. at 502, 90 L. Ed. at 266. Again toward the end of the opinion we emphasized that 'the town of Chickasaw does not function differently from any other town.' 326 U.S. at 508, 90 L. Ed. at 269. I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly

like any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town". Indeed, at the time this injunction was issued, there were only two stores on the property. Now there are supposed to be about 17, but they are all conceded to be 'commercial establishments'. The remainder of the property in the center has been laid out as a large parking lot with individually marked parking spaces provided for business customers. All I can say is that this sounds like a very strange 'town' to me.

The majority opinion recognizes the problem with trying to draw too close an analogy to *Marsh*, but faces a dilemma in that *Marsh* is the only possible authority for treating admittedly privately owned property the way the majority does. Thus the majority opinion concedes that 'the respondents here do not own the surrounding residential property and do not provide municipal services therefor'. But that is not crucial, according to the majority, since the appellant in *Marsh* was arrested in the business district of Chickasaw. The majority opinion then concludes that since the petitioner in *Marsh* was given access to the business district of a company town, the petitioners in this case should be given access to the shopping center which was functioning as a business district. But I respectfully suggest that this reasoning completely misreads *Marsh* and begs the question. The question is, under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, i.e., 'residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated'. 326 U.S. at 502, 90 L. Ed. at 266. I can find nothing in *Marsh* which indicates that if one of these features is present, e.g., a business district, this is sufficient

for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.

In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court proceeded to determine the issue left unresolved by *Logan Valley*—whether where the activity is unrelated to the operations of a shopping center, the center may be enjoined from distributing handbills or other information. *Lloyd* narrowly restricted the application of *Logan Valley* to picketing directly related to the shopping center uses. 407 U.S. at 563. In effect the *Lloyd* Court examined the content of the "speech" to ascertain its applicability to the premises. (The "speech" in *Lloyd* being anti-war protesting.) The Court further noted that the *Lloyd* shopping center did not meet the standards of the "company town" as set forth in *Marsh* and was not "public property" which would entitle the protesters to distribute handbills as would be permissible on public property.

Much of the confusion engendered by *Lloyd* and *Logan Valley* was resolved in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976). In *Hudgens* Labor Union members were picketing within the confines of a privately owned shopping center. The Court reviewed the history of the *Marsh* doctrine and the subsequent decisions in *Logan Valley* and *Lloyd* and noted: 424 U.S. at 518,

> And in the performance of that duty we make clear now, if it was not clear before, that the rationale of Logan Valley did not survive the Court's decision in the Lloyd case. Not only did the Lloyd opinion incorporate lengthy excerpts from two of the dissenting opinions in Logan Valley, 407 U.S. at 562-653, 565, 33 L. Ed. 2d 131, 92 S. Ct. 2219; the ultimate holding in Lloyd amounted to a total rejection of the holding in Logan Valley . . . .

It becomes incumbent upon this Court now to measure the argument that Princeton University falls within the scope of the *Marsh* doctrine, as well as *Hudgins*. We are of the opinion that

on the facts before us, Princeton University cannot be considered a "company town" under *Marsh*. The defendants would have the Court pick and choose between those attributes of a self-contained community which the defendant would deem important, and disregard the lack of attributes of the "community" or "towness", which are not found within Princeton University. Thus, it is not simply a matter of substituting "museums" for "sewers" or "radio and newspaper organizations" for "fire departments" which would allow the application of the *Marsh* doctrine (Def. Brief p. 17). It is a community having *all* of the attributes of a "town" which allows it to fall within the scope of the doctrine. The lack of post office, banking facilities, fire department, sewer facility, meaningful commercial area, and the presence of clearly defined restrictions on entry to campus, boundary markings and barriers and restrictions on access to University functions and activities seriously limits a viable argument that Princeton University is a "company town". It is not sufficient to say that the University comes close to being a self-contained community to impose upon it constitutional limitations of these monumental proportions. There can be little doubt that one can distinguish between the distribution of materials on the public streets of Princeton, New Jersey, and the distribution of materials within the private gates of Princeton University. The elimination of the shopping center "fiction" as created in *Logan Valley* and as rejected in *Lloyd* and *Hudgins* would cause the rejection of establishing a "fiction" of creating a "company town" out of a private university. The test cannot be that Princeton University is "substantially like" a "town"; the standard of *Marsh* is that "but for" private ownership, there is no difference between the public and private. As a result, the University cannot be barred on First and Fourteenth Amendments grounds from exercising its rights to prosecute under *N.J.S.A.* 2A:170-31 in this case: *But see Browns v. Mitchell,* 409 F.2d 593 (10th Cir. 1969) which was decided before *Hudgins* and *Lloyd* wherein Judge Murrah stated:

> The students in our case suggest that the various conventional public services and functions performed by

the University give it the color of a public institution and thus may be likened to the company town in Marsh, and the public way in Logan Plaza. From this they seem to rationalize that the disciplinary action complained of was done under color of state law, hence amenable to due process and a violation of civil rights. Superficially, this line of thought has some appeal but it is specious and wholly untenable. We may concede, without deciding, that judged by the totality of its public functions this University may be likened to Marsh and Logan Plaza for the purpose of exercising First and Fourteenth Amendment rights in its public ways. But that is as far as the rationale of these cases takes us.

Nor do we find the "isolation" described in *Peterson v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973), to be applicable to Princeton University. The plight of the migrant workers described in *Peterson* and the other migrant worker cases cited by the parties and the policy considerations which flow therefrom cannot be analogized with that of Princeton University students. While defendants urge that some students never venture beyond the confines of the University, that is a matter of choice, rather than the compulsion by circumstance described in *Peterson*.

The Courts of this state have taken somewhat divergent views regarding the dissemination of information on private property. In *State v. Carr*, 119 N.J. Super. 385 (App. Div. 1972), defendants were convicted of trespassing after attempting to distribute anti-war leaflets while on school property. The Court rejected the constitutional arguments offered by the defendants, and stated

> Here we have a simple trespass case. Defendants were not students and were engaged in non-school activities and they returned to the school grounds after they had been forbidden to be on the property. The public's right and overriding need to have its schools run without outside interference permits a reasonable limitation on defendants'

First Amendment rights. Anderson v. Sills, 56 N.J. 210, 265 A.2d 678 (1970). See also Adderley v. Florida, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).

See also State v. Kolcz, 114 N.J. Super. 408 (Cty. Ct. 1971), which overturned convictions of trespass against defendants who had entered a self-contained retirement community for the purposes of seeking signatures on a petition to change the form of government. The case appears to be decided on constitutional grounds, but is somewhat vague as to the specific constitutional basis of the decision, and query whether the later decisions in *Lloyd* or *Hudgins* would have changed the result in *State v. Kolcz*?

In *State v. Shack*, 58 N.J. 297 (1971), defendants were convicted of trespass after entering onto a migrant farm for the purposes of aiding migrant farm workers in their role as representatives of the Office of Economic Opportunity, a Federal agency. The Court rejected defendants' argument that the migrant labor camp falls within the scope of *Marsh v. Alabama*, supra, and specifically declined to determine the issues on constitutional grounds, holding that state law would preclude the owner of real property from barring the particular defendants from entering onto the migrant worker camps.

While we are satisfied in the present case that the defendants could lawfully be barred, either on a constitutional basis, or under state law, from entering onto University property for the purposes of distributing their literature, if there is to be a reconsideration of the University's policy as to barring similarly situated individuals, it must be on non-constitutional rather than constitutional grounds.

The defendants' most compelling argument lies in the policy consideration of whether a private university, because of its nature and purpose, should provide a forum for all views, no matter how divergent, when such views are expressed in a reasonable, peaceful and orderly manner. While we are not prepared at this time to hold that the present status of the law of this State carves out an exception to the rights of private

property owners to prohibit persons such as the defendant from entering onto private property when the private property owner is a school or university, if there is to be a review of such regulations and prohibitions by the property owner, it must be by the property owner after full consideration of its purposes and ideals. This then becomes a matter not of judicial compulsion, but of judicious restraint on the exercise of extraordinary power by a private property owner. While we hold that the Constitution cannot compel the University to open its gates to third parties wishing to espouse divergent views (and we clearly distinguish this from the laudatory University policy statement which freely allows students and personnel to speak out on all issues) we question, without deciding, whether a private university, dedicated to free expression, meets it commitment by a semblance of restriction on the orderly expression of ideas. Neither the State nor the defendants contend Princeton University should be anything other than a place for the expression and discussion of all views, however divergent, but this standing alone cannot be the basis of the University not having the benefit of the laws of this State.

For the reasons set forth above, we hold that (a) the University is not a company town under *Marsh v. Alabama,* and therefore, reject constitutional arguments set forth by the defendants; and (b) the defendant did, in fact, trespass on the University property after being warned not to do so and is in violation of *N.J.S.A.* 2A:170-31. The defendant is found guilty as charged and is fined $15 and $10 costs.

Princeton University, *Rights, Rules, Responsibilities* . . . , 1977-78 edition, page 24.

Solicitation

No individual or oganization shall solicit charitable donations or customers in the dormitories or other areas of the University without express authorization. Such authorization must be obtained from the Office of the Dean of Student Affairs in the case of buildings and grounds on the main campus; the Office of the Dean of the Graduate School in the case of the Graduate College; or the Office of the Director of the Plasma Physics Laboratory in the case of the buildings and grounds on the Forrestal Campus. Authorization to solicit in academic buildings or University offices will granted only after consultation with the responsible academic and administrative officers.

Persons who are sales agents for off-campus business concerns will ordinarily not be granted permission to advertise or solicit customers on campus except when specifically requested by a recognized University student, employee or faculty organization. Similarly, representatives of off-campus charitable organizations or political groups will ordinarily not be permitted to solicit door-to-door in University dormitories or offices, or in University academic buildings, although they may be permitted to solicit elsewhere on the grounds of the University. Campus-based organizations, profit and non-profit, will usually be granted permission to solicit widely on campus, subject to the general University regulations prohibiting obstruction of University activities or interference with individual rights, upon filing a request with the appropriate official listed above.

SUPREME COURT OF NEW JERSEY

M-405 SEPTEMBER TERM 1980

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRIS SCHMID,

Defendant-Appellant,

and

PRINCETON UNIVERSITY,

Intervenor-Movant.

No member of the Court who voted with the majority having moved, the petition for rehearing is dismissed as moot.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 18th day of December, 1980.

/s/ STEPHEN W. TOWNSEND
Clerk

FILED
Dec. 19, 1980
/s/ STEPHEN W. TOWNSEND
Clerk

Filed: March 10, 1981

IN THE SUPREME COURT OF THE STATE OF NEW JERSEY

PRINCETON UNIVERSITY AND STATE OF NEW JERSEY,

Appellants

v. Docket No. A-100-79

CHRIS SCHMID,

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Princeton University hereby appeals to the Supreme Court of the United States from judgment of the Supreme Court of the State of New Jersey, entered herein on November 25, 1980.

The State of New Jersey's sole interest in this appeal is that set forth in its letter of December 8, 1980 to the New Jersey Supreme Court, namely that the questions raised are substantial and should be fully litigated.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ THOMAS H. WRIGHT, JR.

Counsel for Appellant Princeton Univ.

/s/ JUDITH A. YASKIN

Acting Attorney General

No. 80-1576

Office-Supreme Court, U.S.
FILED
JUL 13 1981
L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JOINT APPENDIX

NICHOLAS deB. KATZENBACH
Counsel of Record
THOMAS H. WRIGHT, JR.
Princeton University
318 Nassau Hall
Princeton, NJ 08544
(609) 452-5560

Attorneys for Appellant
Princeton University

MICHAEL COLE
Assistant Attorney General
Counsel of Record
State House Annex
Trenton, NJ 08625
(609) 292-4965

Attorney for Appellant
State of New Jersey

JAMES R. ZAZZALI
Attorney General of
New Jersey
State House Annex
Trenton, NJ 08625
(609) 292-4965

Attorney for Appellant
State of New Jersey

JERROLD KAMENSKY
Counsel of Record
Tomar, Kamensky, &
Smith, P.A.
194 S. Broad St.
Trenton, NJ 08608
Of Counsel:
SANFORD LEVINSON

Attorneys for Appellee

APPEAL DOCKETED MARCH 17, 1981
JURISDICTION POSTPONED MAY 18, 1981

INDEX

	Page*
Chronological List of Relevant Docket Entries	1a
Opinion of the Municipal Court of the Borough of Princeton—October 30, 1978	JS 49a
Transcript of Motion [and Trial *de Novo*]—February 15, 1979:	
Oral Opinion of Superior Court of New Jersey, Law Division—Criminal	2a
Order of the Superior Court of New Jersey, Law Division—Criminal—February 20, 1979	JS 48a
Letter from the Clerk of the Supreme Court of New Jersey—September 20, 1979	4a
Opinion of the Supreme Court of New Jersey—November 25, 1980	JS 1a
Opinion of the Supreme Court of New Jersey, Denying Petition for Rehearing—filed December 19, 1980	JS 70a
Notice of Appeal—March 10, 1981	JS 71a
Order of the Supreme Court of the United States Postponing Jurisdiction—May 18, 1981	5a

---

* Page numbers in the form "JS . . . a" refer to the appropriate pages in the Appendix of the Jurisdictional Statement.

CHRONOLOGICAL LISTING OF RELEVANT DOCKET ENTRIES

In the Municipal Court of the Borough of Princeton—Docket No. C138

Stipulations of Fact and Supplemental Stipulations of Fact	(set forth in Opinion)
Opinion of Judge Carchman	October 30, 1978

In the Superior Court of New Jersey, Law Division—Criminal, Mercer County—Docket No. C138, Appeal No. 30-78

Stenographic Transcript of Trial *De Novo*	February 15, 1979
Order Adjudging Defendant Guilty of Violating N.J.S.A. 2A:170-31	February 20, 1979
Notice of Appeal	March 12, 1979

In the Superior Court of New Jersey, Appellate Division—Docket No. A-2264-78

(bypassed)

In the Supreme Court of New Jersey—Docket No. 16,458, Appeal No. A-100-79

Order Directly Certifying Appeal	September 20, 1979
Notice of Motion of AICUNJ for Leave to Appear as Amicus	November 27, 1979
Order Granting Motion	January 28, 1980
Oral Argument	February 4, 1980
Opinion	November 25, 1980
Petition for Rehearing	December 5, 1980
Order Denying Petition for Rehearing	December 18, 1980
Notice of Appeal	March 10, 1981

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL
MERCER COUNTY
Docket No. C138
Appeal No. 30-78

STATE OF NEW JERSEY,

Plaintiff,

vs.

STENOGRAPHIC TRANSCRIPT OF MOTION

CHRIS A. SCHMID

Defendant.

* * * * *

Date: February 15, 1979
Before: Honorable George Y. Schoch, A.J.S.C.

* * * * *

[p.26] THE COURT: I am frank to admit I don't see where there is anything here for me to decide because Judge Carchman has written an opinion that I consider to cover [p.27] the situation completely. To argue that Princeton University comes within the rule of *Marsh vs. Alabama* seems to me to be straining.

In -- I am quoting now from *Hudgins* at page 516 to 424 U.S.: "The question is under what circumstances can private property be treated as though it were public. The answer that *Marsh* gives is when that property has taken on all the attributes of a town, i.e., residential buildings, streets, system of sewers, sewage disposal plant, business block." And we don't have that situation here with Princeton.

The policy of the University may be suspect when they suggest that they want to expose the student body to all phases of education and then keep certain people out, but that is a policy consideration it seems to me and not a Constitutional question.

As I said, I frankly don't see how I can improve on the opinion written by Judge Carchman and I adopt it with these additional comments which in fact may be [p.28] only repetition. I think that is part of the opinion that he has given. I can see the dichotomy between Princeton keeping out persons that they feel are espousing unpopular causes and the theory behind university education, but, as I say, that to me does not reach the level of a Constitutional question, that is really something—that is really something that the student body may have to attack, if they wish their exposure to all types of political parties to take place within the confines of the campus.

So, consequently, I adopt the opinion of Judge Carchman and find the defendant guilty. I impose a fine of $15 and $10 costs.

* * * * *

[certificate omitted in printing]

SUPREME COURT OF NEW JERSEY

[letterhead omitted in printing]

September 20, 1979

Thomas Wright, Jr., Esq.
University Counsel
Nassau Hall
Princeton, N. J. 08540

RE: *State v. Chris Schmid*
Docket # 16,458

Dear Mr. Wright:

As you can see from the attached order, the Supreme Court has directly certified the above appeal. The matter involves a challenge by the defendant to his arrest for trespass while distributing Labor Party materials while on Princeton University property. The Court is hereby inviting Princeton University to intervene in this appeal.

Should you wish to accept the Court's invitation, the University must file 9 copies of a brief within 30 days of the receipt of this letter. You will be subsequently notified as to an argument date.

Very truly yours,

[signature omitted in printing]

STEPHEN W. TOWNSEND
Clerk

ENCLS.
SWT/kab

cc: Attorney General
American Civil Liberties Union

SUPREME COURT OF THE UNITED STATES

No. 80-1576

PRINCETON UNIVERSITY and NEW JERSEY,
Appellants,

v.

CHRIS SCHMID

APPEAL from the Supreme Court of New Jersey.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

May 18, 1981

JUSTICE BRENNAN took no part in the consideration or decision of this case.

Office-Supreme Court, U.S.
FILED
APR 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

PRINCETON UNIVERSITY & STATE OF NEW JERSEY,
Appellants

v.

CHRIS SCHMID,
Appellee.

On Appeal from the
Supreme Court of New Jersey

MOTION TO DISMISS APPELLANT'S APPEAL OR AFFIRM THE DECISION OF THE COURT BELOW

Jerrold Kamensky, Esquire
TOMAR, KAMENSKY & SMITH, P.A.
194 South Broad Street, Trenton, N.J.
Counsel of Record for
THE AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY

OF COUNSEL & ON THE BRIEF:
Sanford Levinson, Esquire
University of Texas Law School
2500 Red River
Austin, Texas 78705
Counsel for
THE AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY

SERRAO ASSOCIATES
Trenton, New Jersey 08618
(609) 883-7979

I. QUESTIONS PRESENTED

A. Whether a private party has the right to appeal the overturning of a state criminal conviction absent the filing of an appeal by the State.

B. Whether a State has the right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.

Appellee in the above entitled case moves to dismiss the appeal or summarily affirm the opinion of the court below based upon the following:

I. STATEMENT OF THE CASE

As Princeton notes, Princeton Brief, p. 5, the facts of this case were stipulated by the parties. See especially the opinion of Judge Carchman, Princeton Brief, pp. 49a-59a. Appellee Schmid was arrested while passing out political literature in a peaceful manner on the grounds of Princeton University. There was no allegation of disorderliness on appellant's part, and the case presents a pure test of the right of a private residential university to freeze out the presentation of alien ideas to its student body by strangers. The New Jersey Supreme Court, in *State vs. Schmid*, 84, N.J. 535, 423 A.2d 615 (1980), unanimously construed the New Jersey Constitution to deny such a right, thereby voiding the conviction of Appellee for trespass in the courts below.

II. QUESTIONS PRESENTED

A. Whether a private party has the right to appeal the overturning of a state criminal conviction absent the filing of an appeal by the State.

B. Whether a State has the right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.

III. ARGUMENT

A. PRINCETON UNIVERSITY IS WITHOUT STANDING TO INVOKE THIS COURT'S JURISDICTION

Appellant Princeton University ("Princeton") correctly cites 28 U.S.C.§1257(2) as the basis for its appeal to this Court. See *Prune Yard Shopping Center vs. Robins,* U.S. , 100 S.Ct. 2035, at 2039-2040 (1980). What Princeton does not address in its statement is the right of a private party to appeal in a criminal case where the State itself does not choose to challenge the overturning of a conviction. Indeed, Princeton appears to be without standing to bring this appeal to Court.

The State of New Jersey, although listed as an appellant, does not assert that provisions of its own State Constitution are unconstitutional, as does Princeton. In the Notice of Appeal filed with the New Jersey Supreme Court, see Princeton's Brief, p. 72a, the State of New Jersey states only "that the questions raised by the University are substantial and should be fully litigated." But the state nowhere has said that the case was wrongly decided by the New Jersey Supreme Court.

Moreover, it should be pointed out that the position of the State of New Jersey and of Princeton University were notably different at the oral argument before the Supreme Court of New Jersey. In substantial measure the State was closer in its argument to that of Appellee Schmid than to the University's for both of the former were arguing in behalf of "balancing" tests, though they differed on the application of the test to the instant case. The University, on the other hand, made the absolutist argument reflected in its Brief to this Court. That argument was rejected not only by the Supreme Court of New Jersey, but also by its own co-appellant. There is thus no warrant whatsoever for believing that the State of New Jersey has adopted Princeton's theory of its extent of protection under the First Amendment, and there is every reason to think that the State has not, unless its position has changed since the oral argument.

The reality of this case is that a private party, Princeton University, is asking this Court to order New Jersey to invoke its criminal process in a situation where the State is not overtly claiming authority to do so (and has been told by its highest Court that it is without such authority). There appears to be no precedent for a private party's being allowed to appeal to this Court in regard to the setting aside of a conviction by a State Supreme Court under

its own Constitution. The State is obviously free to lodge such an appeal, but they have not genuinely done so in the instant case. As Princeton University is without standing, this Court is without jurisdiction and should dismiss the instant appeal.

B. (1) THE STATES ARE FREE TO PROTECT INDIVIDUAL LIBERTIES EVEN WHERE THE FIRST AMENDMENT ARGUABLY DOES NOT, AND THE NEW JERSEY SUPREME COURT'S CONSTRUCTION OF ITS OWN CONSTITUTION TO DO SO SHOULD BE SUMMARILY AFFIRMED

In the majority opinion in *Prune Yard Shopping Center vs. Robins*, supra, Mr. Justice Rehnquist emphasized "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constition." 100 S.Ct., at 2040. See also United States Constitution, Amendment 10. That is precisely what the New Jersey Supreme Court did in the instant case, correctly determining that the right of free flow of political information asserted by Appellee was so fundamental that, regardless of its possible lack of protection by the First Amendment of the United States Constitution, it was protected by the New Jersey Constitution, Article 1, paragraph 6 and 18.

This case is therefore controlled by *Robins*, and the decision of the New Jersey Supreme Court is a fit candidate for summary affirmance.

B. (2) PRINCETON UNIVERSITY'S ARGUMENT IN REGARD TO ITS RIGHT OF "ACADEMIC FREEDOM" UNDER THE FIRST AMENDMENT IS FRIVOLOUS AND DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

Princeton University correctly notes that academic freedom is "a special concern of the First Amendment," Brief, p.7, quoting *Univeresity of California Regents vs. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.). What the University does not do is recognize the context within which academic freedom has been placed. Indeed, Justice Powell himself focused on the freedom of a university to make its own judgment as to . . . the selection of its student body," *id.* an issue absent from this case. He went on to quote the passage from Justice Frankfurter's concurrence in *Sweezy vs. New*

Hampshire, 354 U.S. 234, 263 (1957) that is itself quoted by Princeton in its Brief, p. 8 ft. 5:

> "It is the business of a university to promote that atmosphere which is most *conducive to speculation, experiment and creation.* It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." (emphasis added)

To put it mildly, Appellee Schmid does not in any manner whatsoever challenge Princeton University's rights in regard to these "four essential freedoms." Princeton remains, even after *State vs. Schmid*, fully in control of its admission process, faculty hiring and methods of instruction, and its curriculum. What Princeton is asserting has nothing to do with academic freedom properly defined in terms of "speculation, experiment and creation." Instead the University is asserting its right to become an enclave of totalitarianism, in which the officials of Princeton University are to be granted the right, to be exercised solely at its discretion, to control *all* of the presentation of ideas to its student body, whether in the classroom or outside of it.[1] In an example of Orwellian newspeak, the previous rights of academic freedom are transformed into the right of "indoctrination in virtually any set of beliefs" espoused by University officials, Princeton Brief, p. 7. This is a shocking argument in its own terms. What makes it truly dangerous is that Princeton wholly avoids recognition of the fact, see Stipulated Fact I, Princeton Brief, p. 54a, that its students are not *only* "its" students, but also, the overwhelming majority of them, citizens of the United States and its States who participate as voting members of the wider polity. Princeton's assertion of its right to indoctrinate — and, concomitantly, to exclude persons like appellee from access to the student-citizens who live on the Princeton campus — represents a thoroughgoing attack on the

---

1. The barrenness of Princeton's academic freedom argument is exposed by its reliance on its status as a *private* university. But to the extent that academic freedom is protected at all by the First Amendment, it is clear that a *public* university would most easily come within its ambit. It simply cannot be the case that Princeton has academic freedom rights that Rutgers does not have. It may have other rights not enjoyed by Rutgers but added protection of academic freedom cannot be one of them.

free examination of ideas that is central not only to academic freedom but to the very idea of the republican form of government articulated by Article IV of the United States Constitution as the *sine qua non* of the American system of self-government.

Princeton's argument is frivolous and unworthy of a great university.

IV. CONCLUSIONS

For each of the reasons set forth above, this Court should summarily affirm the opinion and judgment of the Court below, or dismiss the appeal for failure to present a substantial federal question or for lack of standing of the appellant.

Respectfuly submitted,

JERROLD KAMENSKY, ESQ.

SANFORD LEVINSON, ESQ.

Office-Supreme Court, U.S.
F I L E D
APR 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF APPELLANT PRINCETON UNIVERSITY OPPOSING MOTION TO DISMISS OR AFFIRM

NICHOLAS deB. KATZENBACH
Counsel of Record
THOMAS H. WRIGHT, JR.

Princeton University
318 Nassau Hall
Princeton, New Jersey 08544
(609) 452-5560

Attorneys for Appellant
Princeton University

Of Counsel:

MICHAEL A. CANDIDO, JR.
MARGARET B. G. FREIBERG
Old Orchard Road
Armonk, New York 10504
(914) 765-1900

April 30, 1981.

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. APPELLEE'S ARGUMENT FOR DISMISSAL MISSTATES THE DECISION BELOW	1
II. APPELLEE'S VIEW THAT THE ACADEMIC FREEDOM PROTECTED BY THE FIRST AMENDMENT APPLIES EQUALLY TO PUBLIC AND PRIVATE UNIVERSITIES IS ERRONEOUS	2
III. PRINCETON UNIVERSITY HAS STANDING TO APPEAL THE DECISION BELOW	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page

Cases

Adams v. Morton, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) 5

Busik v. Levine, 63 N.J. 351, 307 A.2d 571, *appeal dismissed*, 414 U.S. 1106 (1973) 5

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 3

Boston v. Jackson, 260 U.S. 309 (1922) 5

Chamberlin v. Dade County Board of Public Instruction, 377 U.S. 402 (1964) 3

Chicago v. Atchison, T. & S. F. Ry., 357 U.S. 77 (1958) 5

Engel v. Vitale, 370 U.S. 421 (1962) 3

Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973) 6

In re Leaf Tobacco Board of Trade, 222 U.S. 578 (1911) ... 5

In re Michigan-Ohio Building Corp., 117 F.2d 191 (7th Cir. 1941) 5

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 3

King v. Buttolph, 30 F.2d 769 (9th Cir. 1929) 5

Lewis v. United States, 216 U.S. 611 (1910) 5

PruneYard Shopping Center v. Robins, U.S. , 100 S.Ct. 2035 (1980) 1

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 3

Robins v. PruneYard Shopping Center, 23 Cal.3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) 2

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 3

Shelton v. Tucker, 364 U.S. 479 (1960) 3

Swann v. Adams, 385 U.S. 440 (1967) 5

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 3

United States v. Shelley, 218 F.2d 157 (2d Cir. 1954) 5

Page

United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978) ... 5

Whitehill v. Elkins, 389 U.S. 54 (1967) 3

Williams v. Morgan, 111 U.S. 684 (1884) 5

Constitutions, Statutes and Court Rules

U.S. Const., First Amendment ..... *passim*

N.J. Const., art. VI, sec. 2, para. 3 5

Rules Governing the Courts of the State of New Jersey, Rule 7:4-4(b) 5

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF APPELLANT PRINCETON UNIVERSITY OPPOSING MOTION TO DISMISS OR AFFIRM

ARGUMENT

I. ***Appellee's argument for dismissal misstates the decision below.***

Appellee seeks to fit the decision below into the rationale of *Prune Yard Shopping Center v. Robins*, —U.S.—, 100 S. Ct.

2035 (1980). To do so he wrongly characterizes the rationale of the New Jersey Supreme Court, claiming that it "correctly determin[ed] that the right of free flow of political information asserted by Appellee was so fundamental that, regardless of its possible lack of protection by the First Amendment of the United States Constitution, it was protected by the New Jersey Constitution . . . " (Motion to Dismiss or Affirm, p. 4). Nowhere did the court below say or imply anything of the kind. Nowhere did it suggest, as did the California Supreme Court in *Robins v. Prune Yard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 347 n.5, 153 Cal. Rptr. 854 (1979), that the free flow of information important to its political processes had been curtailed by the private ownership of hitherto public forums. Nowhere did it confine its decision to the "free flow of *political* information" (emphasis added).

Nor can one find *Prune Yard*-like facts in this record. Indeed, the New Jersey Supreme Court explicitly concluded that "numerous public areas [contiguous to the campus] apparently furnish to members of the public, as well as the college community, ample alternative locations other than the property of the University itself as means for the dissemination and exchange of information, views, and ideas" (Jurisdictional Statement, p. 14a).

II. *Appellee's view that the academic freedom protected by the First Amendment applies equally to public and private universities is erroneous.*

The greatness of the First Amendment lies in its reach. It protects from governmental interference that academic freedom defined in terms of " 'speculation, experiment and creation' ", of which appellee approves and, equally, "the right of 'indoctrination in virtually any set of beliefs' ", which he deplores (Motion to Dismiss or Affirm, p. 5). Far from being "Orwellian newspeak", the latter equally with the former is the essence of the freedom protected. Ironically, the more appellee paints Princeton's claim to that protection as "shocking," "truly dangerous," "frivolous," and "unworthy" (Motion to Dismiss

or Affirm, pp. 5, 6), the more he demonstrates both the need and the wisdom of according Princeton such protection from government.[1] Without that protection, Princeton's "academic freedom" becomes a mockery which can be violated at will.

It would seem obvious that the scope of a private university's choice of what it will or will not teach is broader than that of a public university. Since a public educational institution is funded by public monies it cannot, of course, engage in the indoctrination of students in particular religious, political or ideological viewpoints.[2] At the same time—and for essentially the same reasons—the courts have recognized the importance to public education of protecting through the First Amendment the independence of public institutions, and especially those who teach there, from political pressures.[3]

Cases involving academic freedom tend to come up in the context of public institutions, that being where governmental interference is most likely to occur. And one can certainly define "academic freedom" in ways which make it especially applicable to public institutions. But this should not lead one to conclude, as appellee appears to do, that the First Amendment applies to private and public universities in a like manner. Private institutions enjoy freedoms which governmental ones do not, simply because the latter are governmental. A public university is *required* to adopt an ideologically neutral educational philosophy and curriculum. Private universities are not. It is ironic and anomalous to urge this Court to conclude that

---

[1] It is also ironic that an organization which has so significantly and importantly defended unpopular causes as has the American Civil Liberties Union should fail to appreciate the importance of permitting the broadest scope to the freedom of private universities. Its failure to do so demonstrates the reality of the danger warned of in Point III of Princeton's Jurisdictional Statement.

[2] *See, e.g., Chamberlin v. Dade County Board of Public Instruction*, 377 U.S. 402 (1964); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

[3] *See, e.g., Regents of University of California v. Bakke*, 438 U.S. 265, 312-13 (1978) (opinion of Stevens, J.); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 580-82 (1972) (Douglas, J., dissenting); *Whitehill v. Elkins*, 389 U.S. 54, 59-60 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion), 261-62 (Frankfurter, J., concurring in result).

the protected exercise of First Amendment rights can render a private educational institution subject to those requirements, which were designed—for the same First Amendment reasons —to constrain public ones.

These principles are fundamental to a free society. We encourage thought, speech and worship free from governmental regulation and we insure the widest freedom to individuals, groups and organizations to espouse particular viewpoints and to attempt to convince others. From the variety of such groups, each urging its own viewpoint, society as a whole is enriched.

But it seems to us that appellee (and the court below) confuses the general desirability of encouraging the presence in society of a diversity of viewpoints with something quite different: the proposition that each group (each private college or university, in this case) should be compelled to hear views which differ from those it espouses. This would impose a particular additional philosophy on all private colleges and universities. That that philosophy in its broad commitment to "openness" and the free examination of ideas happens to be one that Princeton University embraces wholeheartedly as its own should not obscure the much larger implications of such an approach for our concept of freedom. One can imagine a concept of freedom predicated on a more or less uniform, governmentally mandated and governmentally enforced kind of "openness" required of every private group. But surely that is not what the Framers of the Constitution had in mind. Their concept of freedom was both more robust and less homogenized. It allows private groups, as well as individuals, to promote their own ideas in their own ways, constrained finally by the limits of their persuasiveness, not by governmental judgments as to what is "suitable" or "reasonable" (Jurisdictional Statement, p. 27a).

III. *Princeton University has standing to appeal the decision below.*

Appellee's contention that this Court should refuse jurisdiction of this appeal because Princeton lacks standing has no basis in law or policy. The requisites for standing are: that

the person seeking review have been a party below;[4] that the party have a personal interest in the litigation;[5] and that the party be aggrieved by the decision sought to be reviewed.[6] Princeton meets those criteria.

Princeton was a party to the proceedings below, having accepted the invitation of the New Jersey Supreme Court to intervene in defendant's appeal.[7] Princeton was not formally a party at the trial stages, but counsel for Princeton prosecuted the case on behalf of the State in the municipal court.[8] Thus, Princeton has participated from the start, and its interest has been recognized by the New Jersey courts and by the Attorney General.

Princeton is not "asking this Court to order New Jersey to invoke its criminal process" (Motion to Dismiss or Affirm, p. 3). Princeton is simply asking this Court to hold that the state constitutional provisions pursuant to which appellee's conviction was overturned are, as interpreted, repugnant to the United States Constitution. Should this Court so determine, further proceedings would be the responsibility of New Jersey authorities.

---

[4] *E.g., In re Leaf Tobacco Board of Trade*, 222 U.S. 578 (1911); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); *cf. Adams v. Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) (person whose objections were entertained will not be heard to say he was not a party).

[5] *E.g., Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77, 83 (1958); *Williams v. Morgan*, 111 U.S. 684 (1884); *In re Michigan-Ohio Building Corp.*, 117 F.2d 191 (7th Cir. 1941); *King v. Buttolph*, 30 F.2d 769 (9th Cir. 1929).

[6] *E.g., Swann v. Adams*, 385 U.S. 440, 443 (1967); *Lewis v. United States*, 216 U.S. 611 (1910); *United States v. Shelley*, 218 F.2d 157 (2d Cir. 1954).

[7] While there is no published rule in New Jersey with respect to intervention in a criminal case, the New Jersey Supreme Court is empowered to make rules governing practice and procedure in the State, N.J. Const., art. VI, sec. 2, para. 3, and may exercise its power by case law rather than rule-making process, *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571, 577 (dictum), *appeal dismissed*, 414 U.S. 1106 (1973). This Court must accept the New Jersey Supreme Court's determination that State law authorized such participation, *see Boston v. Jackson*, 260 U.S. 309, 313 (1922), and it is clear from the New Jersey court's action on the Petition for Rehearing that, in its view, Princeton was a party with standing.

[8] *See* Rule 7:4-4(b) of the Rules Governing the Courts of the State of New Jersey.

Nor is Princeton here seeking to vindicate a general public interest in the enforcement of the New Jersey criminal laws, or the special interest of a victim in the punishment of an offender, *see Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 378-79 (2d Cir. 1973). It should be obvious that Princeton's interest is unrelated to the criminal dimension of the case. The court below held that appellee had not violated the criminal trespass statute *because* Princeton was obligated by the State Constitution to let appellee use Princeton's campus for his expressive purposes. Thus, Princeton's interest is not whether the state (through refusing, for example, to prosecute) can permit Schmid to impose himself on Princeton; it is, rather, whether the state *itself* can impose Schmid (and all others seeking to engage in expressive activity) on Princeton. It is that state policy which diminishes Princeton's freedom to carry out its educational mission on its own property as it chooses. And it is that policy which renders Princeton a party aggrieved.

Appellee's argument assumes that Princeton is trying to coerce the State to do something which the State is opposed to doing. That assumption is wrong. In fact, the State has joined Princeton in this appeal.

CONCLUSION

For each of the reasons set forth above, this Court should deny appellee's motion to dismiss the appeal or affirm the decision of the court below, and should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

NICHOLAS DEB. KATZENBACH
Counsel of Record
THOMAS H. WRIGHT, JR.

Princeton University
318 Nassau Hall
Princeton, New Jersey 08544
(609) 452-5560
Attorneys for Appellant
Princeton University

Of Counsel:

MICHAEL A. CANDIDO, JR.
MARGARET B. G. FREIBERG
Old Orchard Road
Armonk, New York 10504
(914) 765-1900

April 30, 1981.

Office-Supreme Court, U.S.
FILED
MAY 12 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY & STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

On Appeal from the Supreme Court of New Jersey

RESPONSE OF APPELLANT, STATE OF NEW JERSEY, OPPOSING THE MOTION TO DISMISS OR AFFIRM

MICHAEL R. COLE
Assistant Attorney General
Counsel of Record

JAMES R. ZAZZALI
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625
(609) 292-4965
Attorneys for Appellant
State of New Jersey

May 12, 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1576

PRINCETON UNIVERSITY & STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

On Appeal from the Supreme Court of New Jersey

RESPONSE OF APPELLANT, STATE OF NEW JERSEY, OPPOSING THE MOTION TO DISMISS OR AFFIRM

The State of New Jersey submits the following response to the appellee's motion to dismiss or affirm.

The State of New Jersey joins Princeton's Jurisdictional Statement because it believes the Constitutional question presented is substantial.

This appeal raises Constitutional questions which directly implicate the legal status of Princeton University as a private educational institution. The decision of the Court below relates to the ability of Princeton to limit access of the public to its premises. That limitation

affects interests of Princeton, not the State of New Jersey. The real interests are those of Princeton and others similarly situated, and those of appellee and others similarly situated.

Appellee's suggestion that the position of the State on the Constitutional issues involved differs from that of Princeton is mistaken. It has not in its own right taken a position on the Constitutional question here presented other than to affirm its conviction that the question was substantial for the reasons stated in Princeton's Jurisdictional Statement and should be resolved by this Court. The State, because of its responsibilities under its trespass laws, does have an interest in having this issue decided authoritatively. Only the United States Supreme Court can do that in view of the federal question Princeton raises. Hence the State joined Princeton in this appeal.

The Supreme Court of New Jersey recognized the dominant interest of Princeton in the Constitutional questions presented and invited Princeton to intervene directly as a party. Princeton did so. When the decision below was handed down, Princeton petitioned the Court for a rehearing. The State did not join in that petition because it believed Princeton was capable of defending its own Constitutional rights—the question presented. The State did, however, clarify its position to the New Jersey Supreme Court as to Princeton's being the "real party in interest" and expressed its independent view that the "questions raised by the petition for rehearing are substantial and that this Court should grant the petition limited to the issues presented therein." Letter of the Attorney General of the State of New Jersey to the Justices of the New Jersey Supreme Court, dated December 8, 1980. The Court below dismissed the petition as moot. Princeton's Brief at 70a.

Appellee argues that the State is not "genuinely" appealing because, unlike Princeton, it has not claimed the

decision below is wrong. That misunderstands the State's interest. The New Jersey trespass statute made it an offense for appellee to intrude on Princeton's campus as he did. The decision below holds he has a State created Constitutional right to do so. Princeton urges this Court to hold the State Constitutional provision, as interpreted, invalid as in conflict with the Fourteenth Amendment. The State's interest in the case is not in whether, ultimately, this Court's resolution favors one of the private parties or the other. Its interest is simply that the issue be resolved by this Court so that it knows in what circumstances its trespass law can be Constitutionally enforced.

Accordingly no claim that the decision below was or was not in conflict with the Fourteenth Amendment is necessary or relevant to the State's appeal. The State joins Princeton's Jurisdictional Statement not because it agrees or disagrees with all the positions taken, but because it does affirm that, for the reasons set forth in the Statement, the question presented is substantial.

Respectfully submitted,

MICHAEL R. COLE
Assistant Attorney General
Counsel of Record

JAMES R. ZAZZALI
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625
(609) 292-4965
Attorneys for Appellant
State of New Jersey

May 12, 1981

Office-Supreme Court, U.S.
FILED
APR 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY, *Appellants,*

v.

CHRIS SCHMID, *Appellee.*

On Appeal From The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES AMICI CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

R. CLAIRE GUTHRIE
One Dupont Circle, N.W.
Washington, D.C. 20036
(202) 833-4741
Attorney for Amici

Of Counsel:

CHRISTINE TOPPING MILLIKEN
NIICU
1717 Massachusetts Ave., N.W.
Washington D.C. 20036
(202) 387-7623

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE FEDERAL QUESTION TIMELY PRESENTED FOR REVIEW IS SO SUBSTANTIAL IT REQUIRES PLENARY CONSIDERATION FOR ITS RESOLUTION .. 4

II. THE FEDERAL CONSTITUTION PROTECTS PRINCETON UNIVERSITY AND OTHER INDEPENDENT NON-PROFIT COLLEGES AND UNIVERSITIES FROM BEING COMPELLED BY THE STATES TO PROVIDE FORUMS FOR THE EXPRESSIVE ACTIVITIES OF STRANGERS TO THEIR CAMPUSES. ... 6

The court below failed to recognize the important first amendment interests of colleges and universities which require greater restriction of the state's power to compel owners of private property to permit expressive activity than was necessary or appropriate under the facts of the Supreme Court's decision in *Prune Yard* 6

III. CONVINCING EDUCATIONAL POLICY CONSIDERATIONS ARGUE AGAINST JUDICIAL SUPERVISION OF PRIVATE UNIVERSITY DECISION-MAKING IN THIS CASE 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASES: PAGE

CBS, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 9

Dahnke-Walker Co. v. *Bondurant*, 257 U.S. 282 (1921) . 5

Goldberg v. *Regents of the University of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967) 8

Healy v. *James*, 408 U.S. 169 (1972) 11, 13

Hudgens v. *N.L.R.B.*, 424 U.S. 507 (1976) 6, 7

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974)..... 6, 8, 9

Otis v. *Parker*, 187 U.S. 606 (1903) 12

PruneYard Shopping Center v. *Robins*, 447 U.S. 74, 64 L. Ed. 2d 741, 100 S.Ct. 2035 (1980) ..... *passim*

Railway Express v. *Virginia*, 282 U.S. 440 (1931) 5

Robins v. *PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) 7

Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) 8, 9

Tinker v. *Des Mones Indep. Community School Dist.*, 393 U.S. 503 (1969)..... 11

University of California Regents v. *Bakke*, 438 U.S. (1978)..... 8

CONSTITUTIONS AND STATUTES:

U.S. Const., First Amendment ..... *passim*

28 U.S.C. §1257(2) 5

N.J. Const., art. I, para. 6 5

N.J. Const., art. I, para. 18 5

OTHER AUTHORITIES:

Note, *Developments in the Law-Academic Freedom*, 81 HARV. L. REV. 1045 (1968) 13

C.R. PACE, THE DEMISE OF DIVERSITY? A COMPARATIVE PROFILE OF EIGHT TYPES OF INSTITUTIONS 1974 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1576

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY, *Appellants,*

v.

CHRIS SCHMID, *Appellee.*

On Appeal From The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES AMICI CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

INTEREST OF AMICI

The American Council on Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) are nonprofit corporations organized under the laws of, and located in, the District of Columbia. Founded in 1918, ACE is a voluntary membership organization composed of 1,401 nonprofit institutions of higher education from both the public and private sectors and 178 educational associations and organizations. NIICU's membership consists of approximately 800 independent, non-profit colleges, universities and educational associations.

ACE is the nation's major coordinating body in postsecondary education. NIICU's mission is to provide a unified national voice for independent higher education in the shaping of public policy. As organizations whose members include the over-whelming majority of four-year colleges and universities, ACE and NIICU are uniquely able to represent the interests of higher education generally on matters of national importance, including the case pending before this Court.

All of the colleges and universities that are members of ACE and NIICU have a substantial interest in the outcome of this case. Nineteen of ACE's and/or NIICU's members are independent, non-profit colleges and universities located in New Jersey. In addition to Princeton University, included in ACE's and/or NIICU's membership are: Beth Medrash Gohova, Bloomfield College, Caldwell College, Centenary College, College of Saint Elizabeth, Drew University, Fairleigh Dickinson University, Felician College, Georgian Court College, Monmouth College, New Brunswick Theological Seminary, Northeastern Bible College, Rider College, Saint Peter's College, Seton Hall University, Stevens Institute of Technology, Union College, Upsala College and Westminster Choir College. All of these institutions will be affected directly by the Court's answer to the question presented for review:

> Whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

The decision of the New Jersey Supreme Court subjects each of these colleges to governmental scrutiny and regulation of expressive activities that are protected from infringment by the United States Constitution.

The many other independent colleges and universities not located in New Jersey that are members of ACE and NIICU also have a substantial stake in the outcome of the Court's review of this case. The Court's judgment regarding the proper balance to be struck between the first amendment right of colleges and universities to determine and pursue educational objectives and the police power of the states can have nationwide consequences.

Finally, the public colleges and universities that are members of ACE have a significant interest in the answer to the question presented by appellants. For purposes of interpreting the scope of an individual's first amendment rights, the courts have long recognized valid and important distinctions between the grounds and buildings of government operated colleges and universities and public streets and parks. A decision that fails to recognize the expressive nature of the education enterprise and to take that into account in balancing Constitutionally protected interests could lead to erosion of other Supreme Court doctrines that properly limit governmental intrusion on academic freedom and insure the ability of all colleges and universities to regulate the use of their facilities in a manner consistent with maintaining an environment conducive to teaching and learning.

SUMMARY OF THE ARGUMENT

In *Princeton University and State of New Jersey* v. *Schmid,* the New Jersey Supreme Court interpreted the New Jersey Constitution as conferring on strangers to the campus of a private university an affirmative right to engage in expressive activities on the college's private property. This interpretation of New Jersey law presents

a substantial federal constitutional question deserving plenary review by this Court.

The decision of the New Jersey Court has the effect of compelling Princeton University to grant access to all parties to the private forum it maintains. This requirement infringes on the four freedoms essential to any university and guaranteed by the first amendment: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

The University's federally protected first amendment right to academic freedom is paramount to any expressional rights conferred on Mr. Schmid by the State of New Jersey. The decision of the New Jersey Supreme Court is, therefore, not supported by this Court's decision in *PruneYard Shopping Center* v. *Robins,* it contravenes the federal constitution and public policy, and it must be reviewed and reversed.

ARGUMENT

I.

The Federal Question Timely Presented For Review Is So Substantial It Requires Plenary Consideration For Its Resolution.

Appellants Princeton University (Princeton) and the State of New Jersey have asked this Court to decide

> [w]hether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

This question presents a substantial issue of federal constitutional law that was properly raised in the courts below and timely brought to this Court for resolution.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2). Section 1257(2) authorizes review of the decision of the New Jersey Supreme Court in *Princeton University and State of New Jersey* v. *Schmid* (hereinafter *Schmid*) because in deciding *Schmid* the New Jersey court of last resort held a state statute[1] valid in the face of a properly presented claim that such statute is repugnant to the Federal Constitution. In *Schmid,* the New Jersey Supreme Court read the "free speech" clauses of the State's Constitution — article I, paragraphs 6 and 18 — as conferring on strangers to the campus of a private university an affirmative right to engage in expressive activities on the college's private property.

This application of the New Jersey Constitution infringes Princeton's federally guaranteed first amendment rights as an independent college or university to determine and fulfill its educational mission.[2] Princeton unsuccessfully challenged this reading of the New Jersey Constitution in a petition for rehearing timely filed. Ap-

---

[1] The challenged "statute" in this case is actually two provisions of the New Jersey Constitution: article I, paragraph 6 and article I, paragraph 18. For purposes of appeal, the Supreme Court has long held that the term "statute" encompasses state constitutions. *E.g., Railway Express Agency* v. *Virginia,* 282 U.S. 440 (1931).

[2] There may be some circumstances, *e.g.* those involving a shopping center or similar commercial enterprise open to the general public, in which it can be argued no substantial federal issue is raised by a reading of the state free speech provisions to limit the rights of private property owners to exclude people from their premises. In order to be entitled to appeal under §1257(2) appellants are not required to challenge the constitutional provisions in their entirety. "A statute may be invalid as applied to one set of facts yet valid as applied to another." *Dahnke-Walker Co.* v. *Bonurant,* 257 U.S. 282 (1921).

pellants' Jurisdictional Statement at 6. As in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 64 L. Ed.2d 741, 100 S.Ct. 2035 (1980), appeal is the proper method of review in this case.

The New Jersey Supreme Court's refusal to decide the important constitutional question posed by Princeton raises questions of law and policy that are of substantial interest to the entire higher education community and the nation and deserve this Court's full attention and thoughtful consideration. To paraphrase this Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247n.6 (1974), any ultimate decision by this Court of the issue presented for review in this case, which leaves unanswered such an important first amendment question of academic freedom and institutional autonomy would be intolerable.

II.

The Federal Constitution Protects Princeton University And Other Independent, Non-Profit Colleges And Universities From Being Compelled By The States To Provide Forums For The Expressive Activities Of Strangers To Their Campuses.

***The Court Below Failed To Recongize The Important First Amendment Interests Of Colleges And Universities Which Require Greater Restriction Of The State's Power To Compel Owners Of Private Property To Permit Expressive Activity Than Was Necessary Or Appropriate Under The Facts Of This Court's Decision In* PruneYard.**

In *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976), the Supreme Court laid to rest the notion that the federal contitutional guarantee of free speech has a part to play in ordering the relationship of two private parties:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only

> against abridgement by government, federal or state. 424 U.S. at 513.

At the same time, the Court held open the possibility that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others. . . ." *Id.*

In *PruneYard Shopping Center* v. *Robins, supra,* the Court confronted its first example after *Hudgens* of state law designed or interpreted to provide additional protection to expressive activities. The Court upheld a decision of the California Supreme Court, *Robins* v. *PruneYard Shopping Center,* 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), that the California Constitution protects the reasonable exercise of free speech in private shopping centers. However, in affirming the lower court decision, the Supreme Court made clear that the exercise of the state police power to protect free speech activities on private property is not without limits, and it is the limits identified in *PruneYard* that require reversal of the New Jersey Supreme Court's decision in this case.

In *PruneYard* the Supreme Court held:

> It is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property *so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.* (emphasis added). 447 U.S. at 81.

The Court rejected the arguments of the shopping center owners in *PruneYard* that the California court's interpretation of the state constitution resulted in a prohibited taking or infringed any other federally guar-

anteed constitutional right of the owners. Specifically, the Supreme Court concluded there was no infringement of the shopping center owner's first amendment rights. 447 U.S. at 88.

The *PruneYard* case is easily indistinguished from *Princeton University* v. *Schmid*, the case now before the Court. Unlike shopping centers which are business establishments with no expressive mission, universities and colleges have as their primary purpose the expressive activities of teaching and research.[1] These purposes are analogous to the functions of newpaper editors that the Court held worthy of protection from even benign state intrusion in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and their entitlement to first amendment protection distinguishes *Schmid* from *PruneYard*.

In *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978), the Supreme Court recognized that the freedom of universities to conduct their "business" is "a special concern of the First Amendment." 438 U.S. at 312. Quoting from Justice Frankfurter's concurring opinion in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), the Court in *Bakke* affirmed that there are four "freedoms" essential to a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 438 U.S. at 312. Encompassed within these four freedoms is the right to control free from government intrusion access to the forum which a university and its campus represents.

---

[1] The function of a university is "to impart learning and to advance the boundaries of knowledge." *Goldberg* v. *The Regents of the University of California*, 248 Cal. App.2d 867, 57 Ca. Rptr. 463 (1967).

In *Miami* v. *Tornillo, supra, citing CBS, Inc.* v. *Democratic Nat'l C'ee*, 412 U.S. 94, 117 (1973), the Court recognized only two controls on the power of the privately owned press to determine and advance its political, social and economic views — the sufficiency of its readers, and the journalistic interests of its editors. Recognizing that neither of these controls might be sufficient to guarantee that the private press would be "responsible" in its selection of news items and fair in its presentation of varying points of view, the Court nonetheless invalidated a Florida statute that sought to guarantee a range of parties access to the media for the purpose of insuring free and fair elections by ensuring an informed electorate.

> A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. 418 U.S. at 256.

Similarly, the number of students wishing to attend an institution and the number of other parties wishing to contribute to its financial well being together with the educational interests of its faculty, students and administration are the only controls that should operate to circumscribe the four essential freedoms of a private university.

Justice Frankfurter, concurring in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261-62 (1957), described best the attitude the courts should have in approaching questions about governmental intrusion in the intellectual life of universities:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true

> in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good-if understanding be an essential need of society-inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. *Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obivously compelling.* (Emphasis added.)

To determine in this case whether there exist compelling interests sufficient to justify the state's intrusion on Princeton's academic freedom, it is necessary first to understand what is *not* at issue here. This case does not present a conflict among members of "the community of scholars" or a situation in which either teachers or students are circumscribed by the administration in their exercise of academic freedom. This case presents the question *who* should decide what rule the "community of scholars" should observe regarding access by persons who are not members of the University community to the scholars' "marketplace of ideas."

In this case the record shows that the solicitation rule challenged by Mr. Schmid and held unconstitutional under the New Jersey Constitution was adopted not by the University administration acting unilaterally but by the Council of the Princeton University Community — a body composed of students, faculty, staff, alumni and administrators. Appellants' Jurisdictional Statement at

2a. The record further shows that the challenged rule governing access was amended by the same representative body in 1979 after Mr. Schmid's trepass arrest and conviction. Appellants Jurisdictional Statement at 2a. Thus, it is the entire University community's policy decision that is adversely affected here not just the whim of an administrator or the contested edict of a governing board.

The New Jersey Supreme Court cited the special nature and needs of the education enterprise in its decision below:

> Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. *See, e.g., Healy* v. *James, supra,* 408 U.S. at 180, 92 S. Ct. at 2345, 33 L. Ed. 2d at 279; *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513-514, 89 S. Ct. 733, 740-741, 21 L. Ed. 2d 731, 741-742 (1969). Appellants' Jurisdictional Statement at 31a.

Yet, the court failed to recognize that the educational policy judgment made by the Council of the Princeton University Community is accorded protection from state intrusion by the first amendment, and it did not develop "obviously compelling" reasons for the intrusion on the first amendment interests of the "community of scholars" countenanced and compelled by the court's decision.

The New Jersey Supreme Court referred to the need to "achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property." Appellants Jurisdictional Statement at 26a. The court held that in this balance the property interests of Princeton must give way to the free speech interests of Mr. Schmid except in so far as Princeton may set reasonable rules to control the exercise of expressional rights on its property. The expressional rights of Princeton were missing in the court's equation and, consequently, the balance reached in the court's decision is improperly weighed in Mr. Schmid's favor.

III

Convincing Educational Policy Considerations Argue Against Judicial Supervision Of University Decision-Making In This Case.

As one reads the New Jersey Supreme Court's opinion in this case, one cannot help but note the court's obvious underlying conviction that in *its* view the solicitation rule enforced by Princeton was in conflict with the court's notion of the proper way to administer a "market place of ideas." It may be that Princeton's rule was illogical or unwise but that is not the province of the court to decide absent compelling constitutional reasons.

The comments of Chief Justice Holmes for the majority in *Otis* v. *Parker,* 187 U.S. 606, 608-9 (1903), are apposite here:

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for

> differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*

Judicial supervision and direction of private university decision-making regarding expressive activities on campus can only "undermine the integrity of private educational institutions, and, with it, the ability of these schools both to experiment and innovate in educational matters, and to satisfy a wide variety of individual wants." Note, *Developments in the Law-Academic Freedom,* 81 HARV. L. REV. 1045, 1055 (1968). "[T]he interests of autonomy in private education call for judicial abstention [in this case]." *Id.*

The process by which Princeton's solicitation rule evolved and was amended is precisely the sort of educational experience one would hope this country's universities are providing their students. As Chief Justice Burger said in his concurring opinion in *Healy* v. *James,* 408 U.S. 169 (1972) (Burger, C.J. concurring),

> [P]art of the educational experience of every college student should be an experience in responsible self-government and this must be a joint enterprise of students and faculty. *It should not be imposed unilaterally from above* . . . (emphasis added).

The courts should be the "last resort" in matters this central to the educational process. *Id.* When as in this case the policy judgment being reviewed represents a concensus reached through a lively and wide ranging internal debate, the courts should not choose lightly to substitute judicial edict for this exemplary educational experience.

This is particularly true given the importance to society of diversity in the higher education experiences offered to students and the pressures toward conformity among colleges and universities that already exist. Diversity among colleges and universities does more than enlarge the range of educational products from which student consumers may choose. Evidence indicates that differences in the educational environments presented by different kinds of institutions (*e.g.*, highly selective and comprehensive universities, strongly denominational liberal arts colleges and colleges emphasizing engineering and science) result in differences in the progress and performance of their students and alumni. *See* C.R. PACE, THE DEMISE OF DIVERSITY? A COMPARATIVE PROFILE OF EIGHT TYPES OF INSTITUTIONS 1974 (hereinafter PACE). Enrollment changes since 1950 have tended to favor the large state universities and, consequently, the contribution and national impact of the distinctiveness of general liberal arts colleges has been reduced. PACE at 130.

These trends have led the authors of a technical report sponsored by the Carnegie Commission on Higher Education to observe

> we think it should be of some concern to those who shape public policy to note that the most distinctive institutions [for the most part private selective institutions], which means to some extent the institutions that are most effective in achieving their purposes, are also the ones that enroll the fewest students, are in the most serious financial condition today, and whose long range future is least assured . . . Further drift toward a least common denominator — whether in public tax policies, *educational conformity*, or private philanthropy — may further reduce the pockets of excellence and distinction in higher education that still remain. (emphasis added) PACE at 131.

A rule which erodes the distinctions between public and private institutions of higher education such as that adopted by the New Jersey Supreme Court in *Schmid* is exactly the sort of push toward educational conformity the Carnegie Commission report decries.

CONCLUSION

For each of the reasons set forth above, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

R. CLAIRE GUTHRIE
One Dupont Circle, N.W.
Washington, D.C. 20036
(202) 833-4741
Attorney for Amici

Of Counsel:

CHRISTINE TOPPING MILLIKEN
NIICU
1717 Massachusetts Ave., N.W.
Washington D.C. 20036
(202) 387-7623

Office-Supreme Court, U.S.
FILED
APR 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

October Term, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,
Appellants,

—against—

CHRIS SCHMID,
Appellee.

On Appeal From the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES IN NEW JERSEY IN SUPPORT OF JURISDICTIONAL STATEMENT

MICHAEL F. SPICER *
JAMIESON, MCCARDELL, MOORE,
PESKIN & SPICER
194 Nassau Street
Princeton, N. J. 08540
Attorneys for Amicus Curiae

* Counsel of Record

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INTEREST OF THE *AMICUS*

This is a brief on behalf of the Association of Independent Colleges and Universities in New Jersey (herein "Association") as *amicus curiae*, submitted with the consent of all parties.

The Association was also *amicus* in the proceedings below before the Supreme Court of New Jersey.

The Association is a non-profit corporation whose members are private colleges and universities located in the State of New Jersey. The members of the Association are as follows:

Name	*Location*	*Approximate Number of Students*
Bloomfield College	Bloomfield	2,100
*Caldwell College	Caldwell	720
Centenary College	Hackettstown	950
College of Saint Elizabeth	Convent Station	850
Drew University	Madison (Morris County)	2,525
Fairleigh Dickenson University	Rutherford & other locations	20,125
*Felician College	Lodi	765
Georgian Court College	Lakewood	1,385
Monmouth College	Long Branch	3,825
Princeton University	Princeton	6,165
Rider College	Lawrenceville	5,730
*Saint Peter's University	Jersey City	4,090
Seton Hall University	So. Orange & Newark	10,225
Stevens Institute of Technology	Hoboken	2,830
Upsala College	East Orange	1,725
Westminster Choir College	Princeton	440

*Institution with religious affiliation

Each of these diverse institutions owns both real and personal property which it uses in its particular educational mission. Each of these institutions is concerned about its ability to formulate its own policies and goals with respect to the dissemination of information on, in or through its facilities. Each of these institutions believes that the ruling in this case by the New Jersey Supreme Court deters it from formulating, implementing and expressing its own institutional policies and goals.

ARGUMENT

The Association joins in the Jurisdictional Statement herein filed by Princeton University, and in particular wishes to emphasize that the decision below denies its members the freedom to pursue their academic objectives without state interference.

Prior to the decision below, each member operated on the assumption that it could control its own facilities based on *its* understanding of its own particular educational goals, policies and mission. Each institution assumed that what was expressed on its campus was not the subject of governmental control. Now, the Supreme Court of New Jersey tells us that these assumptions are not fully correct. It is now the *Court's* understanding of the particular institution's "goals" (App. 29a), "purposes" (App. 29a), "policies" (App. 30a) and "mission" (App. 29a) that is ultimately the controlling factor.

It may well be that in most cases the Court and the institution would agree on the aims of any particular institution. However, this does not mitigate the result where there is no such agreement. The member institutions view the intrusion of government into their most basic responsibility as a change which is fundamental to the concept of private education and as a very significant "chilling" of their rights of expression and use of their property.

The issue of what may be expressed on the campus of a private educational institution should be left to its trustees, administrators, faculty, alumni and students. It is these persons whose rights are reduced when State government regulates the policy of the institution.

There is a perspective of this case that cannot be viewed when only the rights of Princeton University are considered. One of the major reasons for the need to

protect the constitutional rights of private educational institutions is to provide for a diversity of educational philosophy and expression. For example, a comparison of Princeton University with its neighbor, Westminster Choir College will reveal great diversity. The Association believes that it is critical to protect this diversity. Permitting a governmental entity to regulate expression on both the campus of Princeton University and on the Choir College, however benign the initial regulation might be, is in our view a certain prescription for loss of diversity.

CONCLUSION

The Court should note probable jurisdiction of this matter because of its great importance to all the private educational institutions in New Jersey and because of the need to protect the constitutional rights of each of these varied institutions to express their views and ideas free of governmental interference.

Respectfully submitted,

MICHAEL F. SPICER
JAMIESON, MCCARDELL, MOORE, PESKIN & SPICER
194 Nassau Street
Princeton, New Jersey 08540
Attorneys for Amicus Curiae

Office Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF APPELLANT PRINCETON UNIVERSITY

NICHOLAS deB. KATZENBACH
Counsel of Record
THOMAS H. WRIGHT, JR.

Princeton University
318 Nassau Hall
Princeton, New Jersey 08544
(609) 452-5560

Attorneys for Appellant
Princeton University

Of Counsel:

MICHAEL A. CANDIDO, JR.
MARGARET B. G. FREIBERG
Old Orchard Road
Armonk, New York 10504
(914) 765-1900

July 13, 1981

QUESTIONS PRESENTED

1. Whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

2. Whether the owner of private property, who was a party below, has standing to appeal a decision overturning a criminal trespass conviction where the basis for the decision is that, under state law, the property owner is constitutionally obligated to permit expressive activities by members of the general public on his property.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
DECISIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE—	
Statement of the Facts	3
The Proceedings Below	4
SUMMARY OF ARGUMENT	6
ARGUMENT—	
I. The decision below, in contravention of the First and Fifth Amendments, interferes with the freedom of Princeton University and other private educational institutions to pursue educational objectives without state interference	7
A. The First Amendment protects "academic freedom" as a "special concern"	7
B. Where private property is devoted to the expressive activities of the owner, any state requirement that the expressive activities of others be permitted contravenes both the First and Fifth Amendments	11
II. The New Jersey Constitution requires governmental agencies to pass judgment on the content of expressive activity in violation of the First and Fourteenth Amendments	15
III. The State of New Jersey may give greater protection to expressive activity under its law than that required by the First Amendment, but it may not give less	19
IV. Princeton University has standing to appeal the decision below	25
CONCLUSION	26

TABLE OF AUTHORITIES

	Page
Cases	
Adler v. *Board of Education*, 342 U.S. 485 (1952).	7
Amalgamated Food Employees Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).	20, 22
Brubaker v. *Moelchert*, 405 F. Supp. 837 (W.D.N.C. 1975).	10
Buckley v. *Valeo*, 424 U.S. 1 (1976).	12, 19
Chicago v. *Atchison, Topeka & Sante Fe Railway Co.*, 357 U.S. 77 (1958).	23
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973).	17, 18, 20
Cox v. *Louisiana*, 379 U.S. 536 (1965).	17
Dartmouth College v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819).	8
Dr. Bonham's Case, 77 Eng. Rep. 646, 8 Co. Rep. 113b (Hil. 7 Jac. 1).	7
Fowler v. *Rhode Island*, 345 U.S. 67 (1953).	17
Freedman v. *New Jersey State Police*, 135 N.J. Super. 297, 343 A.2d 148 (1975).	21
Grossner v. *Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968).	15
Heffron v. *International Society for Krishna Consciousness, Inc.*, 49 U.S.L.W. 4762 (U.S. June 22, 1981).	17
Hudgens v. *National Labor Relations Board*, 424 U.S. 507 (1976).	*passim*
Illinois Migrant Council v. *Campbell Soup Co.*, 574 F.2d 374 (7th Cir. 1978).	21
In re Leaf Tobacco Board of Trade, 222 U.S. 578 (1911).	23
In re Michigan—Ohio Building Corp. 117 F.2d 191 (7th Cir. 1941).	23
Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952).	16
King v. *Buttolph*, 30 F.2d 769 (9th Cir. 1929).	23
Kingsley International Pictures Corp. v. *Regents of the University of New York*, 360 U.S. 684 (1959).	16

Page

Laguna Publishing Co. v. *Golden West Publishing Co.*, 110 Cal. App. 3d 43, 167 Cal. Rptr. 687 (Ct. App. 1980). 20

Lewis v. *United States*, 216 U.S. 611 (1910). 23

Lloyd Corp. v. *Tanner*, 407 U.S. 551 (1972). 22

Lynch v. *Household Finance Corp.*, 405 U.S. 538 (1971). 11

Marsh v. *Alabama*, 326 U.S. 501 (1946). ..... *passim*

Metromedia, Inc. v. *City of San Diego*, 49 U.S.L.W. 4925 (U.S. July 2, 1981). 12

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974). ..... *passim*

Niemotko v. *Maryland*, 340 U.S. 268 (1951). 17

Petersen v. *Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973). 21

Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972). 17

PruneYard Shopping Center v. *Robins*, 447 U.S. 74 (1980). ..... *passim*

Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367 (1969). 20

Robins v. *PruneYard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1980). 17, 22

Smith v. *Ellington*, 334 F. Supp. 90 (E.D. Tenn. 1971).. 15

Speake v. *Grantham*, 317 F. Supp. 1253 (D. Miss. 1970) *aff'd per curiam*, 440 F.2d 1351 (5th Cir. 1971). 14

State v. *Kolcz*, 114 N.J. Super. 408, 276 A.2d 595 (Middlesex County Ct. 1971). 21

State v. *Shack*, 58 N.J. 297, 277 A.2d 369 (1971). 21

Swann v. *Adams*, 385 U.S. 440 (1967). 23

Sweezy v. *New Hampshire*, 354 U.S. 234 (1957). 7-8, 9

United States v. *Shelley*, 218 F.2d 157 (2d Cir. 1954). ... 23

United States v. *Sherman*, 581 F. Supp. 1358 (9th Cir. 1978). 23

University of California Regents v. *Bakke*, 438 U.S. 265 (1978). 7, 9

Waugh v. *Board of Trustees*, 237 U.S. 589 (1915). 14

Williams v. *Morgan*, 111 U.S. 684 (1884). 23

Page

Constitutions, Statutes and Court Rules

United States Constitution, First Amendment. ..... *passim*
United States Constitution, Fifth Amendment. ..... *passim*
United States Constitution, Fourteenth Amendment..... *passim*
28 U.S.C. §1257(2) (1976). 2
New Jersey Constitution, art. I, para. 6. ..... *passim*
New Jersey Constitution, art. I, para. 18. ..... *passim*
New Jersey Statutes Annotated §2A:170-31 (1971). 2, 3
New Jersey Statutes Annotated §2C:18-3 (1981). 3
Rules Governing the Courts of the State of New Jersey, Rule 7:4-4(b). 4

Other Authorities

G. Brodrick, *A History of the University of Oxford* (1900). 12, 13
C. Mallet, *A History of the University of Oxford.* 13
Porter, *The Oxford-Cap War at Harvard,* in *Student Activism, Town and Gown in Historical Perspective* (A. DeConde ed. 1971). 13
Emerson, *First Amendment Doctrine and the Burger Court,* 68 Cal. L. Rev. 422 (1980). 20
Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court,* 43 Law and Contemporary Problems 66 (No. 3 1980). 20
Note, *Private Abridgment of Speech and the State Constitutions,* 90 Yale L.J. 165 (1980). 20

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF APPELLANT PRINCETON UNIVERSITY

DECISIONS BELOW

The opinion of the Municipal Court of the Borough of Princeton, dated October 30, 1978, is unreported. A copy is contained in the appendix to the Jurisdictional Statement, starting at JS 49a.[1] The Order of the Superior Court of New Jersey, Law Division—Criminal, dated February 20, 1979, is

[1] "JS . . . a" refers throughout to the appropriate page of the Appendix to the Jurisdictional Statement. "JS . . ." refers to the appropriate page of the Jurisdictional Statement.

also unreported; a copy appears at JS 48a. No written opinion was filed by the court; but at the trial the court orally stated its opinion. The portion of the February 15, 1980, trial transcript containing this statement appears in the Joint Appendix, starting at JA 2a.[2] The opinion of the Supreme Court of New Jersey, dated November 25, 1980, was reported at 84 N.J. 535, 423 A.2d 615, and is set forth at JS 1a.

JURISDICTION

The subject of this appeal is the constitutionality under federal law of provisions in the New Jersey Constitution which, as construed by the state's highest court, would effectively deprive private schools and universities of the right to decide for themselves whether to receive strangers who wish to use their campuses for engaging in expressive activities. Rejecting the contentions of Princeton University ("Princeton") and the State of New Jersey, the Supreme Court of New Jersey—in an opinion issued November 25, 1980 (JS 1a)—upheld Article I, paragraphs 6 and 18, of the New Jersey Constitution as not repugnant to the United States Constitution. On December 19, 1980, the court below denied a timely petition for rehearing. (JS 70a). Princeton and the State of New Jersey filed a Notice of Appeal on March 10, 1981. (JS 71a).

This Court has jurisdiction to review the judgment below by virtue of 28 U.S.C. § 1257(2). *Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 79-80 (1980). Jurisdiction was postponed by this Court on May 18, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First, Fifth and Fourteenth Amendments to the United States Constitution; of Article I, paragraphs 6 and 18 of the New Jersey Constitution; and of New Jersey Statutes Annotated 2A:170-31 (1971), are set forth at JS 2-3.

---

[2] "JA . . . a" refers throughout to the appropriate page of the Joint Appendix.

STATEMENT OF THE CASE

Statement of Facts

Appellant Princeton University is a private, not-for-profit, and primarily residential educational institution. (JS 49a, 52a-53a). It is situated in the Borough of Princeton, New Jersey. (JS 1a). Its purposes include the teaching of its students and "the transmission of knowledge and learning to society at large." (JS 28a).

Appellee Chris Schmid was in 1978 a member of the U.S. Labor Party. Neither he nor his party was in any way connected with Princeton University.

On February 15, 1978, appellee entered onto Princeton's campus, uninvited and without permission, to distribute and sell political materials. (JS 4a). A University proctor informed him on that occasion that it was forbidden for persons not connected with the University to enter the campus to solicit support or contributions (unless they had been invited or sponsored), and that if he did so again he would be subject to arrest for trespassing. (JS 3a-4a). Nevertheless, on April 5, 1978, without seeking or receiving permission, appellee again entered the campus to sell and distribute political material. (JS 1a-2a, 49a-50a). He was arrested by a member of the Princeton University Security Department, and was charged with violating New Jersey's general trespass statute, N.J. Stat. Ann. § 2A:170-31 (1971).[3]

In keeping with its purpose of "transmi[tting] knowledge and learning to society at large", (JS 28a), Princeton had issued to the public a blanket invitation to attend lectures, cultural performances, and other events designated as open to the public. (JS 29a). The policy regarding expressive activities *by* the public, however, was narrower.

At the time of appellee's arrest, Princeton had the following policies regarding expressive activity on campus. Members

[3] This statute was superseded in 1979 by N.J. Stat. Ann. § 2C:18-3 (1981).

of the University community could speak freely on campus, subject only to the qualification that they not disrupt essential university operations or significantly infringe on the rights of others. Public speaking on campus by persons *not* connected with the university was also allowed (subject to the same qualifications) in the case of "*speakers whom the students, faculty, or staff wish[ed] to hear*". (JS 2a) (emphasis added). Any member of the University community could distribute political material on campus. (JS 49a). Any person or group *not* connected with the University had to obtain express authorization from a specified University official in order to distribute material or solicit on campus, and such authorization was not granted unless such person or group had an *invitation or sponsorship from a person or organization affiliated with the University.* (JS 49a-50a).

The Proceedings Below

Defendant was tried for trespass in Princeton Borough Municipal Court on October 20, 1978. He was convicted and fined $15 plus $10 costs. A trial *de novo* by the New Jersey Superior Court, Law Division, on February 20, 1979, also resulted in conviction, and the same fine was imposed. Defendant appealed to the New Jersey Superior Court, Appellate Division. While the case was pending there it was certified by the Supreme Court of New Jersey.

At trial, defendant had stipulated to the facts. His sole defense was his contention that the First Amendment to the United States Constitution and Article I of the New Jersey Constitution entitled him to distribute and sell political leaflets on Princeton's property. Princeton—which was invited by the state supreme court to become a party-intervenor in the appeal—did so.[4] Princeton denied that either the federal or the state constitution protected defendant's intrusion on Princeton's

[4] The trial in the municipal court was prosecuted by counsel for Princeton University on behalf of the state, pursuant to Rule 7:4-4(b) of the Rules Governing the Courts of the State of New Jersey, but Princeton was not actually a party at that stage.

campus. It further contended that any law purporting to create such a right of access would be void as violative of Princeton's rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution. Such a law would, *inter alia*, infringe Princeton's First Amendment right to conduct its own expressive activities without government interference.

The Supreme Court of New Jersey reversed the judgment of conviction, holding that Article I, paragraphs 6 and 18, of the New Jersey Constitution obligated Princeton University to let outsiders use its facilities (subject only to "suitable" restrictions) for the "reasonable" exercise of their "constitutional freedoms of speech and assembly."[5] The court laid down a "multifaceted test" to be applied by courts to ascertain in a given case whether, and to what extent, a private property owner would be required to accommodate speech and assembly on its property by others. The test involves "(1) the nature, purposes, and primary use of [the] property. . . , (2) the extent and nature of the public's invitation to use [the] property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." (JS 27a).

The court upheld, in the face of Princeton's challenge, the federal constitutionality of the state law as construed.[6] It relied upon this Court's holding in *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980), that a state may adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. In a timely petition for rehearing, Princeton argued that the New Jersey court had misapplied *Prune Yard* (which was decided by this Court after the Supreme Court of New Jersey heard oral argument in the present case). The petition for rehearing was denied without opinion, and this appeal was taken.

---

[5] The court declined to decide whether the First Amendment also gave rise to a right of access on the facts at bar.

[6] The trial courts did not reach the question, as they held that no right of access was created by the constitutional provisions the defendant relied on.

SUMMARY OF ARGUMENT

Princeton being an educational institution whose property is devoted to expressive purposes, its freedom to determine for itself what expressive activities may take place on its property is protected by the First Amendment through the Fourteenth from state intervention, including judicial intervention. Article I of the New Jersey Constitution as construed by the court below violates the First Amendment in that it requires Princeton to allow strangers to engage in expressive activities on its campus whenever such activities are judicially determined to be consonant with Princeton's educational philosophy. Princeton contends that the judgment as to what is or is not discordant with its philosophy is for Princeton alone to determine. For state officials, including judges, to make such judgments necessarily involves them in weighing the content of the expressive activities involved, and that intrusion is forbidden by the First Amendment.

This Court's decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), should not be read as permitting states to prohibit private abridgment of expressive activity on private property where the property itself is devoted to the expressive activities of the property owner. *PruneYard* found state enforced access to shopping centers by members of the general public for expressive activities inoffensive to the First and Fifth Amendments because of the commercial use of the property. It specifically distinguished enforced access to a shopping center from enforced access to a newspaper (as in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974)), pointing out that the vice of state enforced access in the latter constituted an " 'intrusion into the function of editors'," and noting that the concerns present in *Tornillo* "obviously are not present" in the shopping center context. 447 U.S. at 88 (quoting 418 U.S. at 257). Princeton contends that such concerns *are* present in *this* case, and that for state officials to intrude into the function of educators is similar to their intruding into the function of editors and violates the First Amendment.

As an interested and aggrieved party to the litigation, Princeton has standing to appeal the decision of the Supreme Court of New Jersey.

ARGUMENT

I

The decision below, in contravention of the First and Fifth Amendments, interferes with the freedom of Princeton University and other private educational institutions to pursue educational objectives without state interference.

A. The First Amendment protects "academic freedom" as a "special concern."

Universities, public or private, are so involved with the values which the First Amendment secures from governmental interference as to make "[t]he freedom of a university to make its own judgments as to education . . . a special concern of the First Amendment." *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978). A community of scholars engaged in research and education—the search for knowledge and its dissemination—is central to the purposes of a university and to "the pursuit of truth which the First Amendment was designed to protect." *Adler v. Board of Education*, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting). Unfettered educational choices are as crucial to the function of a university as the editorial choices of a newspaper. Like a newspaper,[7] and unlike a company town[8] or a shopping center,[9] the property of a University is devoted to expressive purposes and is constitutionally protected from governmentally mandated access.

As Justice Frankfurter eloquently argued in his concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), a free society demands "the exclusion of governmental intervention in the intellectual life of a university".[10] 354 U.S. at

---

[7] See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[8] See *Marsh v. Alabama*, 326 U.S. 501 (1946).

[9] See *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980).

[10] An early illustration of the educational autonomy of the English universities is *Dr. Bonham's Case*, 77 Eng. Rep. 646, 8 Co. Rep 113b (Hil. 7 Jac. 1). There Lord Coke found a statute requiring examination and certification of persons practicing medicine inapplicable to a graduate of Cambridge because "it ought to be presumed, every doctor of any of the universities to be within the statutes, *sc.* to be profound, sad, discreet, groundly learned, and profoundly studied." *Id.* at 651, 8 Co. Rep. at 117a.

262. The vice of the New Jersey court's interpretation of Article I of the New Jersey Constitution is that it makes government, not the University, the judge of what is or is not "discordant" with Princeton's educational philosophy. (JS 28a—30a). If it is open to government to interpret what is or is not consistent with a university's educational philosophy, "the freedom of a university to make its own judgments as to education" is substantially diminished. The prohibition of the First Amendment cannot be reduced to a mere need for state government to "give substantial deference to the importance of institutional integrity and independence" and to "accord" private colleges and universities "a generous measure of autonomy and self-governance". (JS 31a).

In the importance to a free society of preserving educational judgments from governmental interference there should be no distinction between public and private universities. But there are differences in how the First Amendment operates to achieve this objective and, accordingly, in the nature of the intellectual life and educational philosophy both permitted and protected. These differences stem from the fact that public universities are the creation of government and are thus, in a sense, governmental entities themselves. The First Amendment operates to protect one part of government from another; or, more precisely, to protect educational judgments in public universities from interference by other governmental bodies on political, religious, or ideological grounds.

Private universities do not carry the burden of being governmental entities. Accordingly, they enjoy the protections of the First Amendment in their unconstrained philosophical and curricular choices.[11] Thus a private university may choose an educational philosophy which seeks to expose students to widely differing viewpoints, as does Princeton, or it may choose to indoctrinate students in a particular ideology or set of beliefs. The choice to create a liberal educational atmosphere, the

[11] *See Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 634-39 (1819).

choice to espouse a particular cause or doctrine, and all choices in between the extremes are exercises of rights guaranteed by the First Amendment against governmental interference.

That same range of choices is not open to public universities because, as creations of government, they are subject to the constraints on government embodied in the First and Fourteenth Amendments. Unlike private universities, they are not free to adopt an educational philosophy confined to a particular religious, political or ideological viewpoint; their educational philosophy and curriculum must be essentially secular—and from an institutional viewpoint—politically and ideologically balanced. That ideological balance or neutrality is maintained by protecting through the First Amendment the free speech of those who teach from interference by other state entities.[12] *Bakke* and *Sweezy*, both involving state universities, illustrate how the Bill of Rights operates both to restrict and protect freedoms of state educational institutions.

What at first blush is difficult to understand is simply that the educational policy choices guaranteed to private universities by the First Amendment are denied to public ones *for the same First Amendment reasons.* Who speaks—whether a private or a public entity—is obviously a crucial factor in a constitutional protection of speech written as a limitation on government. Accordingly the First Amendment would protect a private institution from governmental interference (including judicial interference) in its efforts to instruct students in a particular orthodoxy, yet would require the same judicial interference to prohibit a public institution from attempting the same objective. The state may not interfere in the choice of a particular educational philosophy in a private institution whether that choice is, like Princeton's, geared to an uncircumscribed search for knowledge or whether it is geared to propagating particular

[12] Academic freedom is, of course, especially important to those who teach as well as to the institutions at which they teach, be they public or private. Princeton University is totally committed to the freedom of its faculty and students to pursue knowledge in their own way without interference by governmental or other authority.

dogmas. Similarly it cannot require that those who teach in public institutions subscribe to and instruct in such dogmas. In each instance the First Amendment protects the educational process from political control and promotes the values of free speech and association.

To the extent a public university opens its campus or other facilities to the general public, it must do so in a nondiscriminatory manner. If it permits its campus to be used by members of the general public for various expressive activities it must, in common with other governmental entities, be neutral as to their content and regulate them in a reasonable manner only as to time, place and manner. It cannot, for example, permit one political candidate to address students and bar another, or permit pamphlets to be distributed by advocates of capitalism and bar those advocating socialism. *See Brubaker v. Moelchert*, 405 F. Supp. 837 (W.D.N.C. 1975). Just as it is not permitted an educational policy which advocates particular political or religious views, it may not use its campus any more than its classrooms for forbidden objectives.[13]

In the case of a private university, where governmental constraints on educational policy are forbidden by the First Amendment, expressive activities on university property may or may not conflict with its educational purpose. The court below acknowledged this possibility when it weighed "the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." (JS 27a). Because Princeton's educational policy encouraged a variety of differing views and, where speakers were invited by a member of the university community, censored none, it would

[13] If, as in this case, a state university permitted use of its physical property for expressive purposes only by those members of the public invited to speak by faculty or students, the ideological neutrality required by the First Amendment would seem to be present. Furthermore, leaving such choices to members of the university community would ordinarily be regarded as a legitimate implementation of educational policy and immune from governmental interference as protected academic freedom.

be easy to conclude, as did the court below, that nothing said on its campus could be offensive to its educational policy. In one sense that conclusion would be correct; it is easy to differentiate Princeton's educational philosophy from that, for example, of private institutions dedicated to propagating particular doctrines. But to do so is to miss the crucial point.

Princeton's choice of its educational philosophy is a choice protected by the First Amendment. So, too, is the method by which it is implemented. The test adopted by the New Jersey court denies to Princeton and other private educational institutions the right to determine what expressive activities are or are not "discordant" with their educational philosophy. That right is protected by the First Amendment and the making of that judgment forbidden to governmental authority.

B. Where private property is devoted to the expressive activities of the owner, any state requirement that the expressive activities of others be permitted contravenes both the First and Fifth Amendments.

The effective realization of a free society depends upon the ability to use one's economic as well as one's intellectual resources in exercising First Amendment rights. A private university cannot function without control over the use to which its property is put. Ownership is fundamental to privacy and to the freedom of association which underlies education.

This point was eloquently stated by the Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1971) (citations omitted):

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

It was, of course, precisely that false dichotomy which misled the court below. It failed to appreciate that by

diminishing Princeton's property rights it diminished its expressive rights as well, and that diminishing its expressive rights was forbidden by the First Amendment.

If, as Princeton contends, the New Jersey Constitution as interpreted below conflicts with the First Amendment, there is no need to show that it conflicts with the Fifth as well. *See Metromedia, Inc. v. City of San Diego,* 49 U.S.L.W. 4925, 4933-34 n.25 (U.S. July 2, 1981). But it is important to observe the interrelation of expressive and property rights. The right to use private property for those expressive purposes for which one has acquired that property is a fundamental right. When a private person or institution uses property to advocate certain ideas and not others, that is an exercise of choice protected from governmental interference by the First Amendment. *See Buckley v. Valeo,* 424 U.S.1 (1976). For the owner of private educational property it is a choice which can be made effective only if his basic property right to exclude those he wishes to exclude is not diminished.

Ever since the early history of English-speaking universities, the importance of university control over the university grounds has been recognized. This control has been viewed as an important incident to the university's ability to create an atmosphere conducive to learning and to the interchange of ideas between faculty and students.

Throughout English history, intrusion by outsiders on university campuses was a consistent source of interference with the educational atmosphere, leading not infrequently to violence between students and townspeople on the university grounds. Other concerns arose because of "the bitter animosity which aggravated town-and-gown rows of the thirteenth and fourteenth centuries [leading to] sanguinary conflicts sometimes bordering on civil war."[14] One of the most notorious of these violent encounters occurred at Oxford University on St. Scholastica's Day in 1354. On this occasion, there was a three day riot, part of which "was spent by the victorious towns-

[14] G. Brodrick, *A History of the University of Oxford* 43 (1900).

people in glutting their savage vengeance, pillaging hall after hall and killing or wounding any scholar who fell into their hands."[15] In the aftermath, the King reaffirmed and strengthened the powers of the University to control activities within university grounds. In order to avoid such disturbances, the universities asserted, and were permitted to assert, extensive control.[16]

Problems like these—which are not unique to England[16a]—have continued down to the present day, and Princeton continues to regard its control over the university grounds as indispensible to the educational atmosphere which it seeks. Teaching and exchange of ideas occur not only in the classroom but on the walkways and grounds of the campus, where students speak to students, professors with professors, and professors with students. In what manner and to what extent persons who are not members of the University community may contribute to this educational process are educational decisions. So, too, is the effort to create on the campus that balance between openness and privacy which is judged most conducive to educational pursuits—a balance required by the fact that some scholars and students feel most productive in one such atmosphere, others in another. A policy which places responsibility on members of the community to issue invitations also helps to insure that speakers be treated with courtesy and

---

[15] *Id.*

[16] Indeed, as early as 13th century England, it was regarded as important for a university not only to have control over its own property, but to exercise its own criminal jurisdiction over offenses committed on that property. For instance, various charters granted to Oxford during the reign of Edward I steadily increased the powers of Oxford University within its own boundaries. The Agreement of 1290, in particular, gave Oxford University broad powers with respect to the surrounding town. Among other things the University Chancellor was given jurisdiction in most civil and criminal cases in which one of the parties was a student at Oxford. 1 C. Mallet, *A History of the University of Oxford* 162-63.

[16a] *See, e.g.*, Porter, *The Oxford-Cap War at Harvard*, in *Student Activism, Town and Gown in Historical Perspective* 273 (A. DeConde ed. 1971).

respect—an important factor in turbulent times. And surely the well-founded reluctance of an academic community to invoke the police powers of the state is a factor in differentiating between members of the academic community (who are subject to informal constraints and disciplinary procedures) and others (who are not) in their campus activities.

To be sure, some of these considerations could be dealt with on most campuses by neutral time, place and manner regulations. Princeton is presently experimenting with such rules. But that choice should be Princeton's,[17] not the court's. Determining institutional policies regulating access is, historically, distinctively related to the nature and purposes of academic communities and to a long tradition of self-governance.

Courts have generally recognized the importance to the educational process of university control over university property. As early as 1915 this Court held in *Waugh v. Board of Trustees*, 237 U.S. 589 (1915), that the state, in operating its public educational institutions, could properly prohibit fraternities on its campuses, against a claim that the students' Fourteenth Amendment rights were thereby impaired. The Court found that the regulation "may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions." *Id.* at 596-97.

Thus, colleges and universities have been held to have inherent authority to promulgate rules and regulations in order to structure the extracurricular experience and environment on campus in a manner consistent with their educational philosophies.[18] This includes the power to regulate the on-campus

[17] These decisions are made at Princeton through regularly constituted bodies in which administrators, faculty and students participate. In Princeton's view, the decision-making process itself has important educational components.

[18] *Speake v. Grantham*, 317 F. Supp. 1253, 1265 (D. Miss. 1970), *aff'd per curiam*, 440 F.2d 1351 (5th Cir. 1971).

behavior of students as well as the use of university property.[19] As the court noted in *Smith v. Ellington*, 334 F. Supp. 90, 93 (E.D. Tenn. 1971): "A University campus is primarily for the students, faculty and administrators and when visitation on the campus of non-students interferes with normal activities of the school, the officials of the school not only have the right to intercede, but it is their duty."

Moreover, the federal courts have consistently rejected what the Supreme Court of New Jersey in effect has accomplished here—requiring private institutions of higher learning to submit to constitutional and statutory requirements designed to regulate governmental behavior.[20] *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968).

In sum, a university's control over its grounds is far different from the owner of a massive shopping center seeking to bar leafleting in its public areas. Just as a university has an important interest in setting its academic standards, in establishing its curriculum, in appointing its faculty and admitting its students, so too does it have an interest in insuring that it controls and regulates activities on its campus which it—not government— judges conducive to its educational mission.

II

The New Jersey Constitution requires governmental agencies to pass judgment on the content of expressive activity in violation of the First and Fourteenth Amendments.

In its opinion below, the Supreme Court of New Jersey adopted a three part test for determining whether an outside speaker may appear on the campus of a private university, taking into account "(1) the nature, purpose, and primary use

---

[19] *Id. See Grossner v. Trustees of Columbia University*, 287 F. Supp. 535, 549 (S.D.N.Y. 1968).

[20] The Supreme Court of New Jersey, in its opinion below, itself noted the long line of cases holding that actions by private universities do not constitute state action. (JS 9a).

of such private property, generally its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." (JS 27a). Under its decision, the university is compelled to open its property to individuals outside the university who wish to speak on university grounds if the court finds, under the particular circumstances of the case, that such activities are not "discordant" or "incompatible" with the university's own activities. (JS 29a-30a). The court below found no such discordance or incompatibility in the circumstances of this case.

Ironically, under the second part of the court's test, the more a university opens its grounds to enable some speakers to engage in campus activities, the more obligated it becomes to admit other speakers. Moreover, the third element of the test seems to call for content-based decisions by the courts, without specifying the criteria by which such decisions are to be made. Thus, while faulting Princeton for not itself having detailed standards for admission of outside speakers, (JS 33a), the Supreme Court of New Jersey has created a standard which is so vague and uncertain as to leave almost unbounded discretion in determining whether particular activities are "discordant" or "incompatible" with "Princeton University's professed educational goals [and] the University's overall use of its property for educational purposes," (JS 29a-30a). The application of such a vague and uncertain standard is clearly impermissible in this sensitive First Amendment area. *Kingsley International Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684, 694 (1959) (Frankfurter, J., concurring); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952) (the reviewing body should not be cast "adrift upon a boundless sea").

Where an arrest for trespass is contemplated, the arresting officer, the prosecuting attorney and the courts are all involved in balancing and evaluating the content of expressive activity. And the very complexity of the test, coupled with its vague

general standards, makes that content judgment all the more dangerous to the freedom of speech and association so fundamental to education.[21]

What is required of government where the content of speech is involved is both a clear standard and neutrality. Where expressive activities on governmental property are involved, government regulations must give adequate notice and be content neutral: time, place, and manner.[22] Courts may review such regulations to insure that they are reasonable in terms of such neutral standards as traffic congestion, public convenience, and the like and that the regulations themselves do not directly or indirectly judge content on their face or in their administration. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 49 U.S.L.W. 4762 (U.S. June 22, 1981); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). Where, under either the First Amendment or state law, expressive activities have been protected from private abridgment, the private property owner has been treated as if he were governmental authority and subjected to the same neutral time, place and manner standards. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Robins v. Prune Yard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 347, 153 Cal. Rptr. 854 (1980). *See Hudgens v. NLRB*, 424 U.S. 507, 520 (1976). Any other test necessarily involves courts in content evaluation—as the decision below so clearly demonstrates.

---

[21] *Cf. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 126-27 (1973) (A right-of-access to radio and television for broadcasting paid editorial advertisements would give rise to a problem of "critical importance to . . . the First Amendment" in that the enforcement authority would tend to be "draw[n] into a continuing case-by-case determination of who should be heard and when.")

[22] "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), *quoted in Hudgens v. NLRB*, 424 U.S. 507, 520 (1976).

When state authority enforces a trespass statute in the ordinary manner it is acting in a neutral way. Enforcing the property owner's decision as to what may or may not be said on his property, and by whom, does not involve any government official in judgment as to the content of the ideas, their merit, or their compatibility with other ideas. Such enforcement merely preserves the property owner's ability to determine for himself the expressive uses of his property, thus protecting and enhancing the ground rules of free public debate essential to the political freedom protected by the First Amendment. The fact that Princeton encourages the free exchange of ideas on its campus does not make that educational policy and its implementation any less a matter of choice free from governmental intervention than would be the case were Princeton to have a policy confined to instruction in some particular orthodoxy.

The court below did not seek to restrict expression on the basis of governmental judgment as to the merits of subject matter or content. It examined that content under a different standard: Is it or is it not compatible with the property owner's primary use of the property? However, by "use" the court below includes both intellectual and physical use; only the latter is content neutral. It is Princeton's contention that, where private property is devoted to First Amendment purposes such as education, that judgment is not for government to make. To hold otherwise is to involve government officials in judgments which—precisely because they involve evaluations of content—cannot avoid having a chilling effect on the exercise of free speech. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-258 (1974); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127-28 (1973).

The fact that Princeton's educational philosophy is itself so open and friendly to all ideas should not be permitted to obscure or trivialize the seriousness of the underlying principle. What is offensive to Princeton is not the content of appellee's speech. It is his refusal to abide by Princeton's rules respecting visitors on campus. Those rules are geared to Princeton's

educational policy, and it is constitutionally wrong for state officials to determine what that policy is or what activities are consonant with it. And the standard which the court below applied to Princeton would, when applied to colleges and universities with less catholic views of education, obviously involve judges in determining what was or was not consonant with a whole range of vastly different but constitutionally protected ideas and ideologies.

III

The State of New Jersey may give greater protection to expressive activity under its laws than that required by the First Amendment, but it may not give less.

There has never been any constitutional doubt that state courts could invoke state constitutions to limit state authority over expressive activity in circumstances where the First Amendment would not have required the same result. Similarly states can create personal rights which serve to expand the freedom of speech and assembly beyond what is guaranteed by the Federal Constitution. But a state may not deprive a person of rights secured from state interference by the First Amendment even if the state is firmly convinced—as the court below undoubtedly was—that the values underlying the freedoms of speech and assembly would thereby be promoted. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), 260-61 (White, J., concurring). *See also Buckley v. Valeo,* 424 U.S. 1, 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .").

PruneYard Shopping Center v. Robins reaffirms those principles. It holds that the fact that expressive activities by members of the general public in a privately owned shopping center are not protected by the First Amendment from private abridgment does not preclude states from protecting those activities. But since *PruneYard* is central to the decision below it should be examined in deeper perspective.

The political and social values which underlie freedom of speech and communication require that persons have reasonable access to channels of communication. Both courts and commentators have expressed concern at the increasing concentration of private ownership of means of communication, and the disappearance of traditional forums due to the growth of large private shopping centers and residential developments, or the relative scarcity of radio and television frequencies. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-02 (1973); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 323-25 (1968); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376, 388-89, 396 (1969); Emerson, *First Amendment Doctrine and the Burger Court*, 68 Cal. L. Rev. 422, 461 (1980); Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Berger Court*, 43 Law & Contemp. Prob. 66, 77-78 (No. 3 1980); Note, *Private Abridgment of Speech and the State Constitutions*, 90 Yale L. J. 165, 167-71 (1980). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248-51 (1974). Governmental intervention to promote expressive activities through enforced access to scarce channels of communication obviously raises delicate and difficult questions; after all, governmental intervention has traditionally been viewed as the principal threat to such activities.

Leaving aside the extraordinarily difficult problems of federal regulation of broadcasting, problems of access have typically arisen in two kinds of situations: first, those where traditional public forums such as public streets and parks in business districts and residential areas have increasingly been replaced by private shopping centers, private industrial parks, private corporate centers, and large private residential developments, *e.g., Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Laguna Publishing Co. v. Golden West Publishing Corp.*, 110

Cal. App.3d 43, 167 Cal. Rptr. 687 (Ct. App. 1980); second, those where the prospective listeners are residents of old-age villages or homes or of migrant worker camps, *e.g., Illinois Migrant Council v. Campbell Soup Co.*, 574 F.2d 374 (7th Cir. 1978); *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973); *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971); *Freedman v. New Jersey State Police*, 135 N.J. Super. 297, 343 A.2d 148 (1975); *State v. Kolcz*, 114 N.J. Super. 408, 276 A.2d 595 (Middlesex County Ct. 1971). The two types of situations raise different policy considerations: in the first, channels through which thousands of people can be efficiently reached; in the second, the desirability of ensuring that relatively immobile residents can be informed of political issues.

In all these situations it is the private ownership of the property involved which is the proferred basis for curtailing expressive activities. To the extent free speech is abridged, it is abridged by private, not governmental, action. Thus, conceptually, it is difficult to reach under the language of the First Amendment.

Nonetheless, in *Marsh* this court held that the First Amendment protected expressive activities in company towns and that private ownership of the property involved was insufficient reason for differentiating a company town from any other municipality. 326 U.S. at 509. The private owners were subjected to the same neutral standards of regulation as public officials. Nor did this Court view imposition of those standards on the property owners as being inconsistent with their constitutionally guaranteed property rights. *Id.* At 506-07, 509.

While this Court has been narrowly divided on the question it has concluded that the First Amendment does not protect free speech in a privately owned shopping center. *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Hudgens* the court stated: "Thus, while statutory or common law may *in some situations* extend protection or private redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitition itself." *Id.* at 513 (emphasis added).

The Supreme Court of California, interpreting the California Constitution, found that in California the growth of privately owned shopping centers replacing downtown business districts posed a threat to the state's political processes if areas equivalent to such traditional channels of communication as public streets were foreclosed to those seeking to exercise state constitutional rights of petition and recall. Accordingly, it interpreted the state constitution to require the private owners of shopping centers to permit expressive activities on their properties subject only to neutral time, place and manner regulations. *Robins v. Prune Yard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979). This Court affirmed, finding no Fifth Amendment "taking" and in the circumstance of private property used as a shopping center, no First Amendment deprivation of the property owner's expressive rights. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 85, 88-89 (1980). Both results were clearly foreshadowed by this Court's opinions in *Marsh* and (despite its limitation by *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and its subsequent overruling by *Hudgens*) in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

In none of the decisions by this Court in *Marsh* or the early shopping center cases was there discussion of any claim by the owner of the private property that he was being deprived of his own First Amendment rights. In *Prune Yard* the property owner raised this possibility for the first time and this Court rejected it in the shopping center context. The contention there was that a property owner could not "be forced by the State to use his property as a forum for the speech of others" and that this infringed his own constitutional right as a potential communicant. 447 U.S. at 485-87. There was no contention that the property was in fact used for such purposes by the owner, and certainly not that such a protected use was its primary—or even an important—function from the owner's viewpoint. It was a shopping center, open to the general public for commercial purposes; it was in no sense an entity with the broad expressive purposes of a University.

Appellant's First Amendment contentions in *PruneYard* were all encompassing. *All* owners of private property are *potential* communicants, and for this Court to have found in that mere potentiality deprivation of a constitutional right would have all but eliminated the situations for permissible governmental protection against private abridgment that were mentioned in *Hudgens*. What *PruneYard* held is that state enforced access to channels of communication is constitutionally permissible in situations where the use of the property is commercial and a legitimate state policy of access is promoted. But, as *PruneYard* recognized, the result is different when the enforced access is to property being used for First Amendment purposes. *Id.* at 88; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

In *Tornillo* this Court struck down a Florida law giving political candidates a right to reply to press criticism. It was "vigorously argue[d] that government has an obligation to ensure that a wide variety of views reach the public." *Id.* at 247-48. The increasing power of the press—and the political need to dilute that power by providing greater access—were urged as justification for the statute, which was said to be aimed at implementing more effectively the policies underlying the First Amendment. This Court responded, *id.* at 254 (emphasis added, footnote omitted):

> However much validity may be found in these arguments, at each point the implementation of a remedy *such as an enforceable right of access* necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment.

This Court continued, *id.* at 258 (footnote omitted):

> Even if a newspaper would face no additional costs to comply with a compulsory access law . . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for

> news, comment and advertising. The choice of material to go into a newspaper . . . whether fair or unfair . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

In *Prune Yard,* arguments of the property owner based on *Tornillo* were rejected on the ground that *Tornillo* " rests on the principle that the State cannot tell a newspaper what it must print ... Thus, the statute was found to be an 'intrusion into the function of editors' . . . *These concerns obviously are not present here.*" 447 U.S. at 88 (emphasis added, citations omitted).

The differences between subjecting editorial judgments "whether fair or unfair" to governmental interference and requiring the private owners of shopping centers to apply neutral standards of time, place and manner to expressive activities on their premises are manifest. The danger to First Amendment values in subjecting editorial judgments to government scrutiny and control are real and obvious. Equally real and obvious are the dangers of subjecting the educational policy of universities to judicial review to determine whether or not expressive activities by strangers are compatible with that educational policy. The concerns not present in *Prune Yard* clearly *are* present here.

Indeed, in one respect this case presents an even stronger First Amendment issue than did *Tornillo.* In *Tornillo* the argument in support of the state law was, as in *Prune Yard,* legitimately related to promoting access to an important channel of communication in factual circumstances which were thought to justify *enforcing* intrusion because of the absence of practical alternatives. In this case, the need for access to Princeton's property by strangers for expressive activity is not a basis for the state policy; indeed, the court below affirmed the existence of "ample alternative locations other than the property of the University itself as means for the dissemination of information, views, and ideas." (JS 14a). With no felt need to

provide access to scarce or contracting channels of communication, the New Jersey court nonetheless intruded governmental judgment and control in violation of Princeton's First and Fifth Amendment rights.

The vague standard adopted by the court below, coupled with the court's apparent willingness to evaluate the content of speech against educational objectives, leaves uncertain how far the New Jersey Constitution would permit governmental intrusion into educational matters. Access to the campus for expressive activity is but one example of a large set of determinations that could be measured against a state's view of what it believes constitutes "freedom of expression." It is considerations such as this that have led this Court to view academic freedom as a special concern of the First Amendment and to insure that educational judgments are protected from governmental interference.

IV

Princeton University has standing to appeal the decision below.

Princeton was a party to the proceeding below, having accepted the invitation of the Supreme Court of New Jersey to intervene in defendant's appeal. As a party with an interest who is aggrieved by the decision of the court below, Princeton has standing to appeal that decision.[23] The State of New Jersey has also appealed.

---

[23] The requisites for standing to appeal are: that the person seeking review have been a party below, *e.g., In re Leaf Tobacco Board of Trade*, 222 U.S. 578 (1911); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); that the party have a personal interest in the litigation, *e.g., Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77, 83 (1958); *Williams v. Morgan*, 111 U.S. 684 (1884); *In re Michigan-Ohio Building Corp.*, 111 F.2d 191 (7th Cir. 1941); *King v. Buttolph*, 30 F.2d 769 (9th Cir. 1929); and that the party be aggrieved by the judgment sought to be reviewed, *e.g., Swann v Adams*, 385 U.S. 440, 443 (1967); *Lewis v. United States*, 216 U.S. 611 (1910); *United States v. Shelley*, 218 F.2d 157 (2d Cir. 1954).

CONCLUSION

The decision of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

NICHOLAS DEB. KATZENBACH
Counsel of Record
THOMAS H. WRIGHT, JR.

Princeton University
318 Nassau Hall
Princeton, New Jersey 08544
(609) 452-5560

Attorneys for Appellant
Princeton University

Of Counsel:

MICHAEL A. CANDIDO, JR.
MARGARET B. G. FREIBERG
Old Orchard Road
Armonk, New York 10504
(914) 765-1900

July 13, 1981

Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY AND STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF APPELLANT STATE OF NEW JERSEY

JAMES R. ZAZZALI
Attorney General of New Jersey

MICHAEL R. COLE
Assistant Attorney General, Counsel of Record

State House Annex
Trenton, New Jersey 08625
(609) 292-4965

Attorneys for Appellant State of New Jersey

July 13, 1981

QUESTIONS PRESENTED

1. Whether a private university has the right under the First, Fifth, and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

2. Whether the owner of private property, who was a party below, has standing to appeal a decision overturning a criminal trespass conviction where the basis for the decision is that, under state law, the property owner is constitutionally obligated to permit expressive activities by members of the general public on its property.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
DECISIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	5

TABLE OF AUTHORITIES

	Page
Cases:	
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	2
Constitutions and Statutes:	
U.S. Const., First Amendment	2
U.S. Const., Fifth Amendment	2
U.S. Const., Fourteenth Amendment	2
28 U.S.C. § 1257(2) (1976)	2
N.J. Const., art. I, para. 6	2
N.J. Const., art. I, para. 18	2
N.J. Statutes Annotated:	
2A:170-3 (1971)	2, 3
2C:18-3 (1981)	3

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY AND STATE OF NEW JERSEY
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF APPELLANT STATE OF NEW JERSEY

DECISIONS BELOW

The opinion of the Municipal Court of the Borough of Princeton dated October 30, 1978, is unreported. A copy is contained in the appendix to the Jurisdictional Statement, starting at JS 49a.[1] The Order of the Superior Court of New Jersey, Law Division—Criminal, dated February 20, 1979, is also unreported and a copy appears at JS 48a. No written opinion was filed by the court; but at the trial the court orally stated its opinion and adopted the Municipal Court's opinion. The portion of the February 15, 1979, trial transcript containing

[1] "JS . . . a" refers throughout to the appropriate page of the Appendix to the Jurisdictional Statement.

this statement appears in the Joint Appendix, starting at JA 2a.[2] The opinion of the Supreme Court of New Jersey, dated November 25, 1980, was reported at 84 N.J. 535, 423 A.2d 615 and is set forth at JS 1a.

JURISDICTION

In its opinion dated November 25, 1980, rehearing denied December 19, 1980 (JS 1a, 70a), the Supreme Court of New Jersey construed Article I, paragraphs 6 and 18 of the New Jersey Constitution as creating a right of access which constituted a good defense to a charge of criminal trespass. Moreover, the court held that those provisions of the state constitution, so construed, were not violative of the United States Constitution. That proposition is challenged in this appeal, as it was below. The Notice of Appeal was filed on March 10, 1981. (JS 71a). Jurisdiction of this Court to review the final judgment of the Supreme Court of New Jersey is conferred by 28 U.S.C. § 1257(2) (1976). *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 79-80 (1980). Probable jurisdiction was postponed by this Court on May 18, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First, Fifth and Fourteenth Amendments to the United States Constitution, of Article I, paragraphs 6 and 18 of the New Jersey Constitution, and of New Jersey Statutes Annotated 2A:170-31 (1971) are set forth at JS 2-3.

STATEMENT OF THE CASE

On April 5, 1978, appellee Chris Schmid entered the campus of Princeton University ("Princeton") a private, not-for-profit educational institution located in the state of New Jersey. He began passing out political literature and soliciting

[2] "JA . . . a" refers throughout to the appropriate page of the Joint Appendix.

purchases of political literature. Under Princeton's then applicable rules, appellee—not being affiliated with the university—was not welcome to come onto the campus for this purpose without first obtaining official permission. Also, Princeton's practice was not to grant such permission except when the outsider requesting it was invited or sponsored by a person or group within the Princeton University community.

Since Schmid's presence and activity on the campus on April 5, 1978, was uninvited, unsponsored, and unauthorized—and since he had entered the campus *knowing* of the requirement for permission—Schmid was arrested and charged with trespassing in violation of N.J. Statutes Annotated § 2A:170-31 (1971).[3]

The State of New Jersey sought and obtained a conviction. Schmid appealed, asserting *inter alia* that he was entitled by the state constitution to leaflet and solicit on Princeton's property. Princeton, as party-intervenor, countered that such a state right of access would violate the First Amendment right of Princeton to engage in educational activity without state interference and the associated Fifth Amendment protection of Princeton's use of its property in exercise of its First Amendment rights. The state supreme court, finding and sustaining a state constitutional right of access by Schmid, reversed the conviction. A petition for rehearing was denied, and Princeton and the State of New Jersey both appealed.

SUMMARY OF ARGUMENT

The federal question raised by appellant Princeton University is substantial and should be decided by this Court. Until the Court passes upon the constitutionality of New Jersey's right-of-access law, there will be controversy regarding the enforcement and enforceability of that law and of the criminal trespass law which the State of New Jersey is responsible for enforcing.

---

[3] This statute was superseded in 1979 by N.J.S.A. 2C:18-3 (1981).

ARGUMENT

Appellant Princeton, as owner and user of the property in question, has a strong and obvious interest of its own in this appeal—an interest which it is fully capable of asserting and defending here. The State of New Jersey deems it neither necessary nor appropriate to express an opinion on the merits of the respective positions of the private parties to this action. The State does wish, however, to reiterate its belief that the federal question raised by Princeton is substantial and should be decided by this Court.

In addition, the State wishes to draw the Court's attention to the desirability of an authoritative resolution of the issues presented. More situations involving persons wishing to engage in expressive activity on the property of others will surely arise in the future. Property owners may request the arrest and prosecution of leafleteers and solicitors. Leafleteers expelled from private property by self-help may seek arrest and prosecution of the property owners. Declaratory judgments or injunctive relief may be sought by one side or the other with regard to prospective entries. Until this Court passes upon the constitutionality of New Jersey's right-of-access law, there will be controversy regarding the enforcement and enforceability of that law and of the criminal trespass law which the State of New Jersey is responsible for enforcing.

CONCLUSION

For the foregoing reasons, the State of New Jersey appeals to this Court to review the judgment of the court below and decide the questions presented.

Respectfully submitted,

JAMES R. ZAZZALI
Attorney General of New Jersey
MICHAEL R. COLE
Assistant Attorney General
Counsel of Record

State House Annex
Trenton, New Jersey 08625
(609) 292-4965

Attorneys for Appellant State of New Jersey

July 13, 1981

CORRECTED COPY

Office - Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

Princeton University and State of New Jersey,

Appellants,

v.

Chris Schmid,

Appellee.

On Appeal from the Supreme Court
of New Jersey

BRIEF OF APPELLEE CHRIS SCHMID

Jerrold Kamensky
Tomar, Kamensky & Smith, P.A.
194 South Broad street
Trenton, New Jersey 08608
(609) 394-8585
Counsel of Record
For the American Civil Liberties
Union of New Jersey

Sanford Levinson
University of Texas Law School
727 East 26th Street
Austin, Texas 78705
For the American Civil Liberties
Union of New Jersey

Attorneys for Appellee
Chris Schmid

Of Counsel:
Douglas Laycock
University of Texas Law School
727 East 26th Street
Austin, Texas 78705

SERRAO ASSOCIATES, INC.
Trenton, New Jersey 08618
(609) 883-7979

QUESTIONS PRESENTED

1. Whether the owner of private property has standing to appeal a decision overturning a criminal trespass conviction, where the basis for the decision is the inability, under the State constitution, of the property owner to invoke state trespass law against certain expressive activities by members of the general public on his property, and where the State does not and cannot lodge a genuine appeal before this Court.
2. Whether the "academic freedom" protected by the First Amendment includes an affirmative duty by the State to allow its trespass law to be used in behalf of an unfettered right by a university to control access to its campus, even in the face of a requirement of the State constitution that its criminal trespass law cannot be available in particular circumstances.

Table of Contents

Questions Presented i
Table of Contents ii
Table of Authorities iii
Caption 1
Statement of the Case 2
Summary of Argument 5
Argument —
I. The State of New Jersey is not genuinely appealing the decision below, and Princeton University is without standing to appeal on its own 6
A. There is no "case or controversy" between the State of New Jersey and either of the other litigants in this case, nor does the State of New Jersey have any Federal claims to raise before this Court 6
B. Princeton University is not a "party" to this criminal case and is therefore without standing to appeal the decision of the court below 8
C. The case is moot as between Princeton University and appellee 12
D. Princeton is without standing to assert the claims of other universities in other settings ... 12
II. There is no state action in the case sufficient to allow Princeton University to assert claims under the First, Fifth, or Fourteenth Amendments ... 15
III. "Academic freedom," however much protected by the First Amendment, is not a genuine issue in this case, and Princeton University's invocation of absolute dominion over its campus is alien both to "academic freedom" and to relevant case law .. 18
IV. The standard articulated by the New Jersey Supreme Court is clear and survives any test established by the "void for vagueness" doctrine . 36
V. The States are free to protect individual liberties even where the First Amendment arguably does not, and the New Jersey Supreme Court's construction of its own constitution violates no right of Princeton University 39
Conclusion 42

Table of Authorities

Cases	Page
Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977)	30
Adler v. Board of Education, 342 U.S. 485 (1952)	18
Aetna Life Insurance Co. v. Haworth, 300 U.S. 229, 240-241 (1937)	7
Associated Press v. United States, 326 U.S. 1, 20 (1945)	29
Baggett v. Bullitt, 377 U.S. 360 (1964)	38
Bailey V. Patterson, 369 U.S. 31, 33 (1962)	11
Bell v. Maryland, 378 U.S. 226 (1964)	16
Bigelow v. Virginia, 421 U.S. 809, 826 (1975)	38
Branzburg v. Hayes, 408 U.S. 665 (1972)	30
Broadrick v. Oklahoma, 413 U.S. 601, 610-611 (1973)	14
Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)	27
CBS v. F.C.C., ___ U.S. ___, 101 S. Ct. 2813, 2830 (1981)	28,32
Civil Rights Cases, 109 U.S. 3 (1883)	15
Connally v. General Construction Co., 269 U.S. 385, 391 (1926)	38
Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 634-39 (1819)	26
Eastex, Inc. v. N.L.R.B., 437 U.S. 556 (1978)	32
Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)	15,17
First National Bank of Boston v. Bellotti, 435 U.S. 765, (1978)	28,29
Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)	28
Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)	37
Healy v. James, 408 U.S. 169 (1972)	25,27
Herbert v. Lando, 441 U.S. 153 (1979)	31
Holland Rantos Co., 234 N.L.R.B. 726, *enforced* 583 F.2d 100 (3d Cir. 1978)	32
Hudgens v. N.L.R.B., 424 U.S. 507 (1976)	15,16,32
Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610 (1976)	38

Cases	Page
Linda R.S. v Richard D., 401 U.S. 614 (1973)	10
Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 91 (1977)	38
Lloyd v. Tanner, 407 U.S. 551 (1972)	16
Lombard v. Louisiana, 373 U.S. 267 (1963)	16
Marsh v. Alabama, 326 U.S. 501 (1946)	16,27,28
McGowan v. Maryland, 366 U.S. 420, 429-430 (1961)	14
Metromedia, Inc. v. City of San Diego, 49 Law Week 4928 (July 2, 1981)	38
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	29,30
Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)	28
Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971)	7
Murdock v. City of Memphis, 20 Wall. 590 (1875)	7
New Hampshire v. Louisiana, 108 U.S. 76 (1883)	7
New York Times v. Sullivan, 376 U.S. 254, 266 (1964)	29,30
Oklahoma ex rel Johnson v. Cook, 304 U.S. 387 (1938)	7
Peterson v. Greenville, 373 U.S. 244 (1963)	16
Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376	31
Poe v. Ullman, 367 U.S. 497, 501 (1961)	11
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	30,35,39,40
Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969)	31,32
Schad v. Mt. Ephraim, ___ U.S. ___, 101 S.Ct. 2176, 2181 (1981)	14,33,37
Scott Hudgens, 230 N.L.R.B. 414 (1977)	32
Smith v. Goguen, 415 U.S. 566 (1974)	38
South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)	7
State v. Miller, 83 N.J. 402, 411, 416 A.2d 821 (1980)	29
Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)	23
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969)	26

Cases **Page**

United States v. Nixon, 418 U.S. 683 (1974) 31
United States v. Sherman, 581 F.2d 1368 (1978) 10
University of California Regents v. Bakke, 438 U.S. 265 (1978) 18,22
West Virginia Board of Education v. Barnette, 319 U.S. 624, 637, 640-42 (1943) 30
Wooley v. Maynard, 430 U.S. 705 (1977) 30
Younger v. Harris, 401 U.S. 31, 33 (1962) 10
Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 31

Constitutions, Statutes and Court Rules

United States Constitution, First Amendment. 5,14,18,21,37
United States Constitution, Fifth Amendment 5
United States Constitution, Tenth Amendment 5,28
United States Constitution, Fourteenth Amendment ... 17
42 U.S.C. §1983 17
New Jersey Constitution, art. I, para. 6 4
New Jersey Constitution, art. I, para. 18 4,36
Rules Governing the Courts of the State of New Jersey, Rule 4:33-1 9
Rules Governing the Courts of the State of New Jersey, Rule 4:33-2 9
Rules Governing the Courts of the State of New Jersey, Rule 7:4-4(b) 9

Other Authorities

R. Hofstadter and W. Metzger, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955) 19
R. MacIver, ACADEMIC FREEDOM IN OUR TIME (1955) 19
L. Veysey, THE EMERGENCE OF THE AMERICAN UNIVERSITY 384-418 (1970) 19,20
E. Pincoffs, ed., THE CONCEPT OF ACADEMIC FREEDOM (1972) 19

Other Authorities **Page**

Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in E. Pincoffs, ed., THE CONCEPT OF ACADEMIC FREEDOM (1972) 19

Developments in the Law — Academic Freedom, 81 HARV. L. REV. 1045 (1968) 19

L. Joughin, ed., ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (1969) 20

Carroll, THROUGH THE LOOKING GLASS (1871) . 21

F. Machlup, *Some Misconceptions Concerning Academic Freedom*, 41 AAUP BULLETIN 753 (1955) . 20,21

R. Fuchs, *Academic Freedom — Its Basic Philosophy, Function, and History*, in L. Joughin ed., ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (1969) 25

No. 80-1576

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

Princeton University and State of New Jersey,

Appellants,

v.

Chris Schmid,

Appellee.

On Appeal from the Supreme Court
of New Jersey

BRIEF OF APPELLEE CHRIS SCHMID

Statement of the Case

Princeton University ("Princeton") is a private, non-profit, and primarily residential educational institution. J.S. 49a, 52a-53a.[1] Approximately 3,725 undergraduates live in dormitories or other housing located on that part of the campus known as the "central campus," which, though bounded by public streets, is entirely Princeton's property.[2] J.S. 52a-53a. Undergraduates may not live in non-University housing without receiving permission from the Dean of Student Affairs. J.S. 59a. Not only must most students live on the central campus; all members of the first- and second-year classes must hold a meal contract at a University-owned dining facility, and approximately 1,672 (75%) of these undergraduates take their meals at facilities located on the central campus, as do approximately 248 (11%) of the third- and fourth-year students. J.S. 53a-54a.

Approximately 87% of the student body are citizens of the United States, 18 or over, and therefore eligible to register to vote under the 26th Amendment to the United States Constitution and the laws of New Jersey or other states. Approximately 1500 of these students are registered to vote in the Borough or Township of Princeton. J.S. 54a.

On April 5, 1978, appellee Chris Schmid, a member of the United States Labor Party, entered the grounds of the central campus of Princeton University for the purpose of distributing material to the voters living on the Princeton campus. Such material involved both a campaign for political office being conducted by the Party and the positions of the Party in general. J.S. 1a. Although there is no evidence whatsoever that appellee was in any way disorderly or otherwise disrupted the

---

[1] "J.S." refers to the Jurisdictional Statement filed by Princeton University on March 17, 1981; "J.A." to the Joint Appendix.

[2] Approximately 457 undergraduates live in other Princeton-operated housing, and 266 live in non-University housing.

operations of Princeton University, he was nonetheless arrested by a member of the Princeton University Security Department and charged with violating New Jersey's general trespass statute.

Although Princeton University had issued to the public a blanket invitation to attend lectures, cultural performances, and other events designated as open to the public, J.S. 29a, the University at that time had a policy whereby members of the public who wished to distribute material on campus had to receive permission from University officials. No standards were listed structuring the granting or denial of permission. J.S. 2a. Appellee Schmid had been denied permission on at least one earlier occasion, and he had not sought permission for his entry onto campus on April 5. J.S. 50a. Princeton University has subsequently revised its regulations concerning access by off-campus individuals or organizations, and current regulations allow access to individuals acting on behalf of candidates for public office or of *bona fide* religious organizations, subject to time, place, and manner restrictions. J.S. 2a-4a.

Appellee Schmid was tried for trespass in Princeton Borough Municipal Court on June 8, 1978.[3] On October 20, 1978, the trial judge delivered an opinion convicting appellee and fining him $15 plus $10 costs. A trial *de novo* on the record by the New Jersey Superior Court, Law Division, on February 20, 1979, also resulted in conviction, and the same fine was imposed. While appellee's appeal to the New Jersey Superior Court, Appellate Division, was pending, the New Jersey Supreme Court directly certified the appeal. That Court, on November 25, 1980, delivered an opinion reversing appellee's conviction. Applying a test taking into account "(1) the nature,

---

[3]The statement in the Princeton Brief, at 4, is in error. Judge Carchman's written decision was handed down on October 20, 1978, but the trial was earlier.

purposes and primary use" of Princeton University, "(2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property," J.S. 27a, the Court found appellee's conduct to be protected by Article I, paragraphs 6 and 18 of the New Jersey Constitution, which guarantee, respectively, freedom of speech and "the right freely to assemble together, [and] to consult for the common good."

Summary of Argument

1. The State of New Jersey is wholly without standing to participate as an appellant in this case, for it can point to no Federal right of the State *qua* State that was infringed by the New Jersey Supreme Court's construction of the New Jersey Constitution. This case therefore represents an unprecedented attempt by a private litigant, Princeton University, to appeal the setting aside of a criminal conviction; Princeton is without standing to challenge the decision of the New Jersey Supreme Court before this Court.
2. Princeton can assert whatever First, Fifth, or Fourteenth Amendment rights it has only against invasions of those rights by the State of New Jersey. The State of New Jersey has in no way invaded those rights by the mere refusal to prosecute the actions of a private citizen.
3. Princeton's version of that "academic freedom" protected by the First Amendment stands the traditional history of academic freedom on its head and distorts the relevant case law invoking that concept. What Princeton University is defending is not "academic freedom," but the absolute dominion of university administrators over every idea that might reach students' minds, whether from the classroom or elsewhere. Appellee concedes that the First Amendment protects "academic freedom" against invasion by the State, but that freedom is in no way contravened by the decision of the New Jersey Supreme Court.
4. The standard articulated by the New Jersey Supreme Court to apply to this and future cases is a careful statement of the various factors that must be taken into account and in no way is subject to invalidation as being "vague".
5. The 10th Amendment to the United States Constitution allows the States to do what they think necessary to safeguard the "republican form of government" that is the essence of our constitutional democracy, and the decision

of a State should be set aside only in the face of compelling evidence that it threatens rights protected by the United States Constitution. Princeton University can point to no evidence whatsoever that its constitutional rights are affected by the decision of the New Jersey Supreme Court.

I. THE STATE OF NEW JERSEY IS NOT GENUINELY APPEALING THE DECISION BELOW, AND PRINCETON UNIVERSITY IS WITHOUT STANDING TO APPEAL ON ITS OWN

A. *There is no "case or controversy" between the State of New Jersey and either of the other litigants in this case, nor does the State of New Jersey have any Federal claims to raise before this Court.*

This case concerns a conviction for criminal trespass which was overturned by the New Jersey Supreme Court. That Court construed the free expression guarantees of the New Jersey State Constitution to prohibit application of the State's general trespass statute to appellee in the circumstances of this case.

Although the State has lent its name to this case as an appellant, its own Brief emphasizes that the "State of New Jersey deems it neither necessary nor appropriate to express an opinion on the merits of the respective positions of the private parties to this action." Brief of the State of New Jersey 4. It seems most unusual to label an "appeal" a statement by the State in whose name the criminal law is invoked and whose Constitution is at issue in this case that it has no opinion about the validity of its own law. Indeed, since the State of New Jersey so specifically disclaims its having a "case or controversy" with either of the other named litigants, jurisdiction is lacking under the most fundamental interpretation of Article III of the United States Constitution, which requires that litigating parties actually have adverse interests. See, e.g.

Moore v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 229, 240-241 (1937).

Similarly fundamental is the fact that New Jersey has no Federal claims it can assert before this Court. Even if the Attorney General of New Jersey believes that the New Jersey Supreme Court misconstrued the New Jersey Constitution, that is obviously not a proper subject for this Court's contemplation. *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). The Attorney General, if this appeal were proper, would have to point to a provision of the United States Constitution that protects the State of New Jersey from itself — i.e., its own Constitution. New Jersey itself cannot assert the loss of *its* First Amendment rights, whatever that might mean, because the New Jersey Supreme Court interpreted the State Constitution to protect appellee's freedom of expression. Nor can any other Federal right be pointed to. Does the government of New Jersey have a protected Federal right against a limiting construction of state law by the State Supreme Court? Does the Federal Constitution confer power on the New Jersey legislature — power not subject to control by the people of New Jersey in their State constitution? To ask such questions, in the American legal system, is to answer them.

Nor can the State gain standing by asserting itself as representing *parens patriae* those citizens of New Jersey who might wish to challenge the constitutionality of the New Jersey Constitution under the United States Constitution. "A state is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens. See *Oklahoma ex rel Johnson* v. *Cook*, 304 U.S. 3876 (1938); *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883)." *Maryland* v. *Louisiana*, ___ U.S. ___, 101 S.Ct. 2114, 2124 (1981). See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966).

There appears to be no previous case where a State has come to this Court for a declaration that its own Constitution, as

construed by its highest Court, is unconstitutional under the United States Constitution. Appellee suggests that this fact exemplifies not only political prudence, but the much more fundamental point that it is almost impossible to imagine how such a case might ever properly arise. When the State notes that it would be "inappropriate" to join Princeton in attacking the validity of its own constitution, it was being more than polite; it was recognizing the impossibility of its assuming the role of a genuine appellant in this case.

The State of New Jersey should be dismissed as a party to this case. Or, if dismissal would be an anomaly given that the validity of New Jersey's constitution is the core issue of this case, this Court should realign the parties. The State should be joined with appellee Schmid, who defends the validity of the New Jersey Constitution, rather than with appellant Princeton, which calls on this Court to assert Federal supremacy over the commands of the State constitution.

B. *Princeton University is not a "party" to this criminal case and is therefore without standing to appeal the decision of the court below.*

Dismissal of the State (or realignment) would not end this case if Princeton University itself had standing. But it does not. The University waits until the very conclusion of its Brief to address this issue. Princeton's entire argument is as follows:

> Princeton was a party to the proceedings below, having accepted the invitation of the Supreme Court of New Jersey to intervene in defendant's appeal. As a party with an interest who is aggrieved by the decision of the court below, Princeton has standing to appeal that decision. The State of New Jersey has also appealed. Brief of Princeton University 25 (citations omitted).

From the previous argument it is obvious that Princeton's last sentence is in error. The rest of the paragraph is equally dubious.

Although one might think that Princeton's strongest claim to being a "party" is the fact that the initial trial before the Princeton Borough Municipal Court was prosecuted by counsel for Princeton University on behalf of the State, pursuant to Rule 7:4-4(b) of the Rules Governing the Courts of the State of New Jersey, the University correctly notes, Princeton Brief 4 ft. 4, that that did not convey status as a party. Instead Princeton claims that it was "invited by the state supreme court to become a party-intervenor in the appeal," Princeton Brief 4. But the letter from the Clerk of the New Jersey Supreme Court to the University Counsel says only that the "Court is hereby inviting Princeton University to intervene in this appeal," J.A. 4a; see also J.S. 5a. How this invitation makes Princeton a party in this *criminal prosecution* is unclear.

Although New Jersey Court Rules, 1969, 4:33-1 and 33-2 provide for intervention, it is obvious that only civil cases are covered by these rules. There is no rule allowing intervention in a criminal case. A letter from the Clerk of the New Jersey Supreme Court is hardly evidence for the proposition that the New Jersey State Supreme Court has decided, in effect, to amend the existing New Jersey Rules of Court by establishing a procedure for intervention by a victim in criminal cases. Although the Court distinguishes, J.S. 5a, between Princeton as an intervenor and the Association of Independent Colleges and Universities in New Jersey as an *amicus curiae*, that distinction is without foundation in existing New Jersey statutory law regulating criminal procedure. Appellee notes as well that the Court's final opinion was captioned *State of New Jersey* v. *Chris Schmid*, J.S. 1a. There is no direct mention of Princeton as a party nor even an "et al." indirectly indicating the presence of third parties.

It would be altogether appropriate for this Court to remand this case to the New Jersey Supreme Court for the specific purpose of its addressing the dimensions of Princeton's status in this case. In the absence of such clarification, there is

certainly no reason for this Court to assume that the New Jersey Supreme Court intended to convey to Princeton University, a private institution, the right to appeal the setting aside of appellee's conviction even if the State could not do so. Indeed, that would be a delegation of sovereign State power over the enforcement of its criminal law.

None of the cases cited by Princeton remotely involves a situation like the instant case,[4] where a private litigant is appealing the setting aside of a criminal conviction. Although the University purports to be "aggrieved by the decision of the court below," Princeton Brief 25, Princeton's grief differs not at all from that of any alleged victim of a crime who is dissatisfied with the decisions of state authorities, whether prosecutors or judges, in regard to the alleged perpetrator of the deed. Were this an ordinary burglary case and the defendant had been ordered freed because, say, the evidence had been seized in violation of the Fourth Amendment, the burglary victim would not have an independent right to appeal, any more than the victim could have forced prosecution in the first place had the public prosecutor determined otherwise.

This case represents the functional equivalent of a private prosecution of the criminal law and is therefore controlled by *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973) (emphasis added):

> The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger* v. *Harris*, 401

---

[4]The cases cited by Princeton in its Brief, at 25 ft. 23, are irrelevant to this case, save perhaps for United States v. Sherman, 581 F.2d 1358 (1978), which involved an attempt by a newspaper to file an appeal following the conclusion of a criminal trial in which the trial judge enjoined the jurors from speaking to anyone, including the press. Although the *Seattle Times* was clearly affected by the order, the Ninth Circuit panel held that it was without jurisdiction to hear an appeal because the newspaper was "not a party to the action below." 581 F.2d, at 1360.

> U.S. 37, 42 (1971); *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962); *Poe* v. *Ullman*, 367 U.S. 497, 501 (1961). Although these cases arose in a somewhat different context, they demonstrate that, *in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution of another.* Appellant does have an interest in the support of her child. *But given the special status of criminal prosecutions in our system,* we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws. The District Court was therefore correct in dismissing the action for want of standing, and its judgment must be affirmed.

At no time in this litigation has Princeton's "nexus" been stronger than that of Linda R.S. She was, after all, being harmed by Richard D.'s alleged failure to pay child support. *Id.* at 618. Although this failure is generally outlawed by Texas criminal law, the prosecutor refused to bring charges against Richard D. on the ground that the statute did not cover fathers of illegitimate children. *Id.*, at 615-616. Linda R.S. argued that the failure to prosecute for that reason violated her child's rights under the Equal Protection Clause. Nonetheless, her interests were not sufficient to generate standing "in the unique context of a challenge to a criminal statute." *Id.*, at 617.

In the instant case, similarly, the State is not prosecuting further the alleged trespass, at least in part, presumably, because its highest court has declared the law invalid as applied. Unlike Linda R.S., Princeton was shown to have suffered no actual harm to any protected interest; indeed, that was one reason for the invalidity of the statute as applied.

In any event, Princeton is not authorized to challenge before this Court the failure of the State of New Jersey to prosecute further appellee Schmid.

C. *The case is moot as between Princeton University and appellee.*

Even if Princeton has party status, there is still no jurisdiction before this Court. Whatever might have once been the case regarding a "nexus between the vindication of [Princeton's] interest and the enforcement of the State's criminal laws," there is at present no nexus at all. The reason is simple: Princeton has amended its internal regulations so as to allow access, subject to suitable time, place, and manner restrictions, to its campus by appellee Schmid and people like him. J.S. 2a ft.2, 33a; Princeton Brief 14. There is therefore no current likelihood of the renewal of the controversy that once existed between Princeton and appellee Schmid. Princeton is in effect seeking an advisory opinion by this Court that its past policy, repudiated now by the University itself, was protected from judicial scrutiny by the New Jersey Supreme Court even when Princeton was attempting to invoke the State's power against appellee. There are many circumstances, of course, where this Court issues declaratory judgments,[5] but it is unprecedented that one be issued in the guise of an appeal by a private litigant of a final judgment in a criminal case where the underlying subject of that case has become moot.

D. *Princeton is without standing to assert the claims of other universities in other settings.*

As if recognizing that it can present no claim before this court that its own interests have been affected by the decision of the New Jersey Supreme Court, Princeton's most passionate arguments in its Brief are made in behalf of universities

---

[5]The fact that Princeton is in reality seeking a declaratory judgment is underlined by contemplating what the result of a reversal of the New Jersey court's decision would be. In a normal criminal case, of course, the result would be the reimposition of the sentence; here, however, the State has not indicated any desire to punish appellee. Even if Princeton has the right to appeal, does it also have the right in effect to fine?

wholly unlike itself, i.e., those universities which choose "to indoctrinate students in a particular ideology or set of beliefs," Princeton Brief 8, as opposed to Princeton's own commitment to the importance of exposing "students to widely different viewpoints," *id.* See also J.S. 30a. Princeton is therefore in effect attempting to represent vicariously those universities which might conceivably raise more plausible objections to the decision of the New Jersey Supreme Court.[6]

In effect, then, Princeton is asserting its standing to demonstrate the "overbreadth" of the New Jersey Supreme Court's decision. But the vicarious representation inherent in the "overbreadth" doctrine is a carefully limited exception to this Court's general teaching:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before this Court. [Citations omitted.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously.

---

[6]The *amicus* Brief filed by the Massachusetts Institute of Technology raises some interesting questions, but none need be considered by the Court in this case. "*Unlike Princeton,* M.I.T. does not permit strangers to engage in any distribution or solicitation activities on its campus. This prohibition is an absolute one, extending to all such activities, regardless of the content of the message or the worthiness of the cause." M.I.T. Brief at 6 (emphasis added). The decision of the New Jersey Supreme Court did not concern universities "unlike Princeton," but Princeton University itself.

Appellee does not concede that *any* residential university could successfully object to the decision of the New Jersey Supreme Court on the First Amendment grounds asserted by Princeton, but it would obviously be a more challenging case were the facts to involve not only M.I.T., but also, say, attempts by Brigham Young University to deny access to a pro-smoking political candidate or by Notre Dame to block access by a pro-abortion group. Such challenges, however interesting, have nothing to do with the instant case and are not before the Court at this time.

> See *McGowan* v. *Maryland*, 366 U.S. 420, 429-430 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-611 (1973).

The most important exception to this doctrine arises in certain First Amendment cases where the fear is expressed that the unnecessarily broad reach of a given statute will inhibit the speech of third parties that would itself be protected by that Amendment. See, e.g., *Schad* v. *Mt. Ephraim*, ___ U.S. ___, 101 S.Ct. 2176, 2181 (1981). Generally, however, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick, supra*, at 615-616.

One notes that the ordinance at issue in *Mt. Ephraim* "prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." *Mt. Ephraim*, ___ U.S. ___, 101 S.Ct. 2181. The test articulated by the New Jersey Supreme Court, J.S. 27a, however, requires a sharply focused judicial inquiry, one of whose purposes is precisely to safeguard the "generous measure of autonomy and self-governance," J.S. 31a, of universities.

Insofar as the basic rationale for the overbreadth doctrine has always been that speech is fragile and proponents of unpopular ideas too easily "chilled" by fear of having to test the overbroad statute, it would be especially unfitting to allow Princeton standing. Here it is the University which is seeking not to speak, but to censor; there is no evidence that those who would censor the free expression of ideas are so easily chilled that this Court must bend generally accepted principles of constitutional adjudication in order to let their interests be fully protected.

For all of the above reasons, therefore, this case should be dismissed for want of standing by the State of New Jersey, which has no controversy with appellee, or by Princeton University, the only litigant actually challenging the decision of the Court below.

II. THERE IS NO STATE ACTION IN THE CASE SUFFICIENT TO ALLOW PRINCETON UNIVERSITY TO ASSERT CLAIMS UNDER THE FIRST, FIFTH OR FOURTEENTH AMENDMENTS

What Princeton is trying to do is to conduct civil constitutional litigation in the guise of a criminal case. Princeton claims the protection of the Fourteenth Amendment (incorporating the First and Fifth Amendments), Princeton Brief 2, but that Amendment runs, of course, only against state action. *Civil Rights Cases*, 109 U.S. 3 (1883); *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978). But there is no state action, relative to Princeton, in this case, although that point is initially obscured by the purported joinder of the State in this appeal.

If the State is dismissed from this case and it becomes recaptioned as *Princeton University* v. *Schmid*, then Princeton would have to show that appellee Schmid violated its constitutional rights. But Schmid *cannot* violate Princeton's First Amendment rights, for he is a private citizen. The State of New Jersey did not order Schmid to enter Princeton's campus. Although Princeton wishes to entangle Schmid in the web of New Jersey's criminal law, it cannot claim that the Constitution operates directly against appellee. The University admits this when it quotes, for a different purpose of course, a relevant passage from *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976): "Thus, while statutory or common law may *in some situations* extend protection or private redress against a private corporation or person who seeks to abridge the free

expression of others, no such protection or redress is provided by the Constitution itself." *Id.*, at 513, quoted in Princeton Brief 21 (emphasis supplied by Princeton).

Ironically, in the litigation below it was appellee who argued that Princeton University met the state action requirement of *Marsh* v. *Alabama*, 326 U.S. 501 (1946), so as to require recognition of his First Amendment rights of political expression, while the University, relying on cases like *Hudgens*, asserted that, as a private entity, it was free to ignore Schmid's claims. The New Jersey Supreme Court did not resolve Schmid's own First Amendment claims, J.S. 16a, because it decided that the New Jersey Constitution itself prohibited application of state trespass law in the circumstances of this case.

Given this Court's decided case law, had the New Jersey Supreme Court upheld his conviction, it would not have been open to Schmid to argue that the trespass conviction *without more*[7] imputed state action to Princeton's denial of his expressional rights. That presumably is the message of the last two "shopping-center" cases, *Lloyd* v. *Tanner*, 407 U.S. 551 (1972) and *Hudgens*, *supra*. See also *Peterson* v. *Greenville*, 373 U.S. 244 (1963); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963); and *Bell* v. *Maryland*, 378 U.S. 226 (1964). If appellee could not claim that his conviction for trespass was "state action" abridging his freedom of expression, then how can Princeton argue that the refusal to convict is state action?

If one recaptions this case as *Princeton University* v. *State of New Jersey*, then Princeton must argue either that the State has an affirmative duty to structure its criminal law to protect Princeton's asserted interests or that the denial of

---

[7]Appellee, had he been convicted and chosen to appeal the conviction to this Court, would have continued to assert his claims under the "public function" doctrine of *Marsh*, but he would not have argued, given the shopping center cases, that Princeton's recourse to state trespass law itself constituted the state action required for vindication of his First Amendment rights.

Princeton's claims itself constitutes state action. Neither proposition is tenable. This Court, in *Flagg Brothers, supra,* spoke directly to this point:

> If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here. . . If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner. 436 U.S., at 165
>
> Here, the State of New York has not compelled the sale of bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaints is not that the State *has* acted, but that it has *refused* to act. *Id.*, at 166.

For these reasons the Fourteenth Amendment claims initially raised by respondent Brooks were dismissed since the requisite state action to come within the Amendment in the first place was lacking.

Princeton's campus has in no way been touched by the State of New Jersey. The State Supreme Court did not enjoin Princeton to change its rules. It simply announced under what circumstances the protections of New Jersey's general trespass law would be unavailable to Princeton, when, that is, "its courts will not interfere with a private" decision by persons seeking to promote political expression to enter Princeton's campus.

Were this the 42 U.S.C. §1983 case that Princeton is trying to place before this Court, it would be dismissed for failure to state a claim, and the reason is simple: It has not been deprived of anything by the State in a manner sufficient to provide

"state action". The result should be no different in the instant case.

III. "ACADEMIC FREEDOM," HOWEVER MUCH PROTECTED BY THE FIRST AMENDMENT, IS NOT A GENUINE ISSUE IN THIS CASE, AND PRINCETON UNIVERSITY'S INVOCATION OF ABSOLUTE DOMINION OVER ITS CAMPUS IS ALIEN BOTH TO "ACADEMIC FREEDOM" AND TO RELEVANT CASE LAW

Princeton's central argument is laid out in its Brief at p.7:

> Universities, public or private, are so involved with the values which the First Amendment secures from governmental interference as to make "[t]he freedom of a university to make its own judgments as to education . . . a special concern of the First Amendment." *University of California Regents* v. *Bakke*, 438 U.S. 265, 312 (1978). A community of scholars engaged in research and education — the search for knowledge and its dissemination —is central to the purposes of a university and to "the pursuit of truth which the First Amendment was designed to protect." *Adler* v. *Board of Education*, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting). Unfettered educational choices are as crucial to the function of a university as the editorial choices of a newspaper. Like a newspaper, and unlike a company town or a shopping center, the property of a University is devoted to expressive purposes and is constitutionally protected from governmentally mandated access. [Citations omitted].

Princeton University's assertion that this case involves the "academic freedom" protected by the First Amendment rests on a wholly distorted understanding of the history and rationale of academic freedom and of the cases protecting that

freedom. No genuine issue of academic freedom is presented by this case.

Princeton University, for all of its erudite asides about Oxford University in the 14th century, Princeton Brief 12-13, has ignored a massive (and easily available) literature detailing the modern history of the concept of academic freedom.[8] See, e.g., Richard Hofstadter and Walter Metzger, *The Development of Academic Freedom in the United States* (1955); Robert MacIver, *Academic Freedom in Our Time* (1955); Laurence Veysey, *The Emergence of the American University* 384-418 (1970); Edmund Pincoffs, ed., *The Concept of Academic Freedom* (1972), especially Van Alstyne, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty," at 59-85; *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1048-1051 (1968); Louis Joughin, ed., *Academic Freedom and Tenure: A Handbook of the American Association of University Professors* (1969). Awareness of this history makes it clear why Princeton is reluctant to confront it.

Although the initial theory of academic freedom developed in 19th century Germany emphasized the threat of governmental interference in the affairs of the university, see, e.g., Veysey, *supra*, at 384, the American theory quickly recognized that threats to the freedom of unfettered inquiry incarnated in the notion of academic freedom could come from many sources. The stress on governmental interference is understandable in a European context where members of the academy controlled not only their own institutions, but also, at times, the municipality within which the institution was located. This was apparently true, for example, of Oxford University. See Princeton Brief 13 ft. 16; Brief of *amici curiae* American

---

[8] Although this Brief touches briefly on the history of academic freedom, appellee directs the Court's attention to the extensive history of the concept presented in the Brief submitted by *amicus curiae* American Association of University Professors.

Council on Education and the National Institute of Independent Colleges and Universities 19. But this pattern of academic control of academic institutions has not been a feature of the American experience of higher education, which instead has placed our great private universities, including Princeton, under the control of lay Boards of Trustees and Overseers.

A recurrent problem in this country has been the tension between students and faculty, on the one hand, and these lay boards, on the other, over what ideas are suitable for examination. Indeed, Professor Machlup has noted "the fact that, in the brief history of academic freedom in the United States, it has been chiefly from the boards of trustees that pressures have been exerted upon professors." Fritz Machlup, "On Some Misconceptions Concerning Academic Freedom," 41 AAUP BULLETIN 753 (1955), reprinted in Joughin, *supra*, at 182 (1969). For example, one of the most important conflicts over academic freedom in the history of American universities took place at Stanford University in 1903, where the contending parties, in effect, were Professor Edward A. Ross and Jane Stanford, the powerful widow of Stanford's founder Leland Stanford. See Veysey, *supra*, at 400-407. Even though the source of interference was private rather than public, the American Economics Association had no trouble issuing a report accusing Stanford of violating the academic freedom of Ross and other members of the faculty. *Id.*, at 406.

Attacks on academic freedom, therefore, can come from any sector which claims the power to control the ideas welcomed onto a university campus for study and elucidation by its faculty and students. It is this recognition of the multiple sources of threats to academic freedom that led Professor Machlup to offer the following definition of the term:

> Academic freedom consists in the absence of, or protection from, such restraints or pressures — chiefly in the form of sanctions threatened by state or church authorities or by the authorities, faculties, or students of colleges

> and universities, but occasionally also by other power groups in society — as are designed to create in the minds of academic scholars (teachers, research workers, and students in colleges and universities) fears and anxieties that may inhibit them from freely studying and investigating whatever they are interested in, and from freely discussing, teaching, or publishing whatever opinions they have reached. *Machlup, supra,* at 178.

One might be especially fearful of attacks mounted by the state; and, of course, the First Amendment makes those attacks uniquely subject to constitutional challenge. But it totally distorts the meaning of academic freedom (and recognition of threats thereto) to focus on the state as the only threat or to view university trustees or administrators as necessarily the protectors of academic freedom.

Appellee does not deny that private universities may sometimes have a right to limit or even deny academic freedom to their faculty or students. Indeed, the 1940 codification of academic freedom by the American Association of University Professors recognizes as much when it states: "*Limitations of academic freedom* because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment" of a faculty member. Joughin, *supra,* at 36 (emphasis added). It is a disservice to linguistic clarity, however, for attacks on academic freedom to be labeled "academic freedom" itself. Perhaps Humpty-Dumpty had the authority to say that "When I use a word . . . it means just what I want it to mean — neither more nor less." L. Carroll, *Through the Looking Glass* 159 (1871). But not even Princeton University by its own fiat can totally erase an existing understanding of "academic freedom" that totally contradicts the assertions made by the University.

In confusing the concepts of the unrestrained power of university administrators[9] with that of "academic freedom," the University makes it impossible to comprehend the extent to which they are not only different, but sometimes even antagonistic, notions. What is worse, the University asks this Court to acquiesce to its confusion. Acceptance of Princeton's argument would make the sentence, "Stanford University violated Ross' academic freedom," incoherent, in the sense that a sentence referring to a married bachelor makes no sense in our language. But the suggested sentence is meaningful, instantly understood by any competent speaker of our language; this very fact exposes the all-important difference between the unconstrained power of university administrators and genuine academic freedom. It also makes clear how radical and anti-academic freedom Princeton's argument is.

The most recent summary of case law regarding academic freedom is contained in Justice Powell's opinion in *University of California Regents* v. *Bakke*, 438 U.S. 265, 312-313 (1978).

---

[9]Princeton, Brief at 14 ft. 17, and amici ACE-NIICU, Brief at 12, both suggest to this Court that Princeton's regulation barring appellee from campus without (standardless) permission represented a "concensus [sic] reached through a lively and wide ranging internal debate," ACE-NIICU Brief at 13. Three comments are necessary:

1. Not only is there not the slightest evidence in the record to support this description of the origins of the regulation in question, but it also can be demonstrated that the description is mistaken.

2. When the Princeton community did become aware of the regulation, following the initiation of the present prosecution by the University administration, the regulation was changed. See J.S. 2a ft.2.

3. Most importantly, are appellee and this Court to understand that Princeton and the ACE-NIICU seriously mean to suggest that this Court should review the internal decision-making processes of universities, in cases like this one, and come up with different decisions depending on the "liveliness" of the debate or identity of the decisionmakers? It is impossible to believe that Princeton would support such judicial intrusion, but unless that is desired by Princeton then the very discussion by the University of its decision making process is utterly irrelevant to this (or any other) case.

Unlike the University, appellee prefers to quote from that opinion at some length, for Justice Powell's conception, taken as a whole, recognizes fully the integral connection between genuine academic freedom and the commitment to the unfettered examination of all ideas. Concomitantly, it offers no support at all for Princeton's attempt to collapse the distinction between academic freedom and unconstrained university autonomy.

> "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the four essential freedoms that comprise academic freedom:
>
> > '. . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).
>
> Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967):
>
> > 'Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that

robust exchange of ideas which discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.' *United States* v. *Associated Press*, 52 F. Supp. 362, 372.'

The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.[48] As the Court noted in *Keyishian*, it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."

[Footnote 48 is set forth in full below]

"[48]The president of Princeton University has described some of the benefits derived from a diverse student body:

'. . . [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours once observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'

'In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers

> in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.' " Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977).

Indeed, Justice Powell, speaking for the Court in *Healy* v. *James*, 408 U.S. 169 (1972), wrote of the "college classroom *with its surrounding environs*" as "peculiarly the 'marketplace of ideas,' " *id.*, at 180 (emphasis added). There is thus full recognition that "academic freedom" cannot be understood apart from the theme of maximum exposure of members of a university community to the diversity of ideas available about our complex world.[10]

It requires only a brief survey of the facts of this case to realize that none of the "four essential freedoms" articulated by Justice Frankfurter is at issue in this case. Appellee does not challenge Princeton University's discretion to choose its faculty or to dictate the subject-matter and method of teach-

---

[10]This theme runs throughout the cases involving academic freedom. See, e.g., the statement by Chief Justice Warren:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. *To impose any strait jacket* upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion) (emphasis added).

Here, of course, it is the University administration that claims the right to impose the strait jacket upon its student body.

For a general review of the case law involving academic freedom, see Ralph Fuchs, Academic Freedom — Its Basic Philosophy, Function, and History, in Joughin, *supra*, at 242-263.

ing. Nor does appellee challenge Princeton's right to choose its own student body.[11]

Appellee does not challenge the right of Princeton University to make "unconstrained philosophical and curricular choices." Princeton Brief 8, citing *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 634-39. Princeton University could limit the views articulated in its classrooms to a single ideology; it can issue statements denouncing the views of appellee and encouraging its student body to have the wit to reject them as well. What Princeton University cannot do —and certainly not in the name of "academic freedom" — is to claim First Amendment protection to operate its campus as an "enclave[ ] of totalitarianism," *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969).[12]

There is an exceedingly simple reason why the rights of university administrators cannot extend, with First Amendment protection, so far as Princeton would have them: Princeton University's students are *more* than students. "Students — who by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age — are adults, who are members of the college or university community." *Healy* v.

---

[11]As developed at length in the *amicus* Brief submitted by the AAUP, it should be noted that even these "essential freedoms" are not absolute. "Academic freedom" could not be invoked to defend teaching students about the effects of illegal drugs by allowing class members to take them. Even more to the point, of course, is the legitimate role of the state is assuring that a university's faculty is not chosen by a racially or sexually discriminatory process. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-e 17 (Supp. v. 1975). And the "essential freedom" of a university to choose its own student body has scarcely been unchallenged by this Court. See *Bakke, supra;* see also Runyon v. McCrary, 427 U.S. 160 (1976).

[12]It is true that Justice Fortas was referrring to "state-operated schools," *id.*, but that is only to say that the First Amendment of its own force may not require private schools to be non-totalitarian. Princeton's argument, of course, is that the First Amendment's protection of academic freedom extends to totalitarianism itself.

James, supra, at 197 (Douglas, J., concurring). "Approximately 87% of the [Princeton] student body are citizens of the United States, 18 or over, and therefore eligible to register to vote under the laws of New Jersey or some other state. Approximately 1,500 students are registered to vote in the Borough or Township of Princeton." J.S. 54a. Students may be limited in the classroom as to what they can hear; university administrators cannot claim First Amendment protection to limit voters outside of the classroom as to what they may be introduced to.

Appellee agrees that Princeton University could, if it wished, limit its teaching faculty and student body to registered Republicans and to issue forthright statements of support for the candidates of that party. But it requires a strained reading of the First Amendment to argue, as did Princeton at the oral argument before the New Jersey Supreme Court, that the University could require its students to live on campus and then, limiting entrance to the campus to Republicans, prevent the introduction on campus of non-Republican ideas. That is to deny voting citizens of the United States freedom to interact with their fellow citizens — whether students or outsiders — in discourse about the great issues of the polity, including, of course, the merits of candidates running for office. Princeton's students "are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of the community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored." *Marsh* v. *Alabama,* 326 U.S. 501, 508 (1946). This Court has very recently reiterated that " 'it is of particular importance that candidates" — and, appellee would add, their representatives — "have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.' *Buckley* v.

Valeo, 424 U.S. 1, 52-53 (1976). Indeed, 'speech concerning public affairs is . . . the essence of self-government,' *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). The First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.' *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1970)." *CBS* v. *F.C.C.*, ___ U.S. ___, 101 S.Ct. 2813, 2380 (1981). In *CBS* this Court upheld a congressional statute requiring limited access to the facilities of private television networks, stating that the disputed statute "makes a significant contribution to freedom of expression by the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." *Id.*

Whether or not appellee is himself protected by the First Amendment in his attempt to gain access to Princeton's campus, a question left unresolved by the New Jersey Supreme Court, J.S. 16a, it cannot be the case that censorship of the sort asserted by Princeton is itself protected by that Amendment from constraint by a State devoted to enhancing "the effective operation of the democratic process." See United States Constitution, Amendment 10; Article IV, Section 4 (guaranteeing a "republican form of government"). The "informational purpose of the First Amendment," *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 782 ft. 18 (1978), prevents the State "from limiting the stock of information from which members of the public may draw." *id.*, at 783. The First Amendment is not violated when a State, as does New Jersey in the instant case, acts to make sure that its citizens or residents will not be limited in "the stock of information" they may receive in order to exercise wisely their duties, "which affect the welfare of the community and nation." *Marsh*, at 508.

In its opinion the New Jersey Supreme Court quoted approvingly the statement of Justice Clifford that "political speech . . . occupies a preferred position in our system of

constitutionally-protected interests. [*State* v. *Miller*, 83 N.J. 402, 411, 416 A.2d 821 (1980).] Where political speech is involved, our tradition insists that government 'allow the widest room for discussion, the narrowest range for its restriction.'" J.S. 22a. The Court went on to add that "the State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights. . . . . Finally, the rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well." J.S. 23a.

The Court did not, but it might well have cited this Court's reminder in *Bellotti*, 435 U.S., at 777 ft. 12 (1978), that "[S]elf government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), quoted in *New York Times* v. *Sullivan*, 376 U.S. 254, 266 (1964)." The New Jersey Supreme Court, recognizing that, in a pluralist society like that of the United States, it is not only governmental officials who exercise power, noted that the protections of the New Jersey Constitution "are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property." J.S. 24a. Thus Article I, paragraphs 6 and 18, of the New Jersey Constitution sometimes prevents the efforts of those with private power to "suppress competing views on public issues," *Bellotti*, *supra*, and this was one such case.

Princeton's counter to this argument is to emphasize this Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), which struck down a Florida right-of-reply statute on the ground that it intruded "into the function of editors," *id.*, at 258, protected by the First Amendment's guarantee of freedom of the press.

This Court most recently reflected on the implications of *Tornillo* in *Prune Yard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). *Tornillo* " rests on the principle that the State cannot tell a newspaper what it must print." *Id.* at 88. The proper analogue would be the demand by the State that Princeton teach certain courses. "There is also a danger in *Tornillo* that the statute would 'dampen the vigor and limit the variety of public debate' by deterring editors from publishing controversial political statements that might trigger the application of the statute. [418 U.S.], at 257. *Thus* the statute was found to be an 'intrusion into the function of editors.' *Id.*, at 258. These concerns obviously are not present here." *Prune Yard*, at 88 (emphasis added). There is no plausible argument that universities will be deterred from what Justice Powell correctly recognized as their mission of intellectual debate, *Bakke*, *supra*, at 312-313, by the requirement that outside participants, under suitable restrictions on time, place, and manner, may sometimes be allowed to convey their views to willing student-citizens outside of the classroom or other protected special space of the university.

As the Editors of the *Harvard Law Review* have noted:

> Opening private property to pluralist expression poses none of the dangers that compelled speech doctrine is designed to prevent. The compelled speech cases have held unconstitutional government attempts to create an orthodoxy in matters of opinion. *Wooley* v. *Maynard*, 430 U.S. at 713-15; *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637, 640-42 (1943), attempts to compel speech in support of a particular viewpoint, *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and measures that penalize expression, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-57 (1974). These decisions are aimed at actions that 'dampen[ ] the vigor and limit[ ] the variety of public debate.' *See, e.g., id.* at 257 (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 279 (1964)).

> Such concerns are not present when private property is opened to pluralist expression, because the state is seeking to obtain a forum for all speakers and any point of view.[13]

One might point out, moreover, that the press, even though explicitly protected by the First Amendment, has not been given the *carte blanche* implied by Princeton to determine, without judicial review, what counts as its protected editorial function. That is, the mere statement by the press that its editorial function is impaired has not been enough to conclude litigation in the press' favor. Thus this Court has at least thrice rejected claims of the press that revolved around the alleged threat to the editorial process posed by the application of state laws concededly applicable to the ordinary citizen. See *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978); *Herbert* v. *Lando*, 441 U.S. 153 (1979). See also *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, in which this Court upheld a municipal ordinance prohibiting newspapers from listing job advertisements by sex.

Princeton University claims for itself what this Court has denied not only the press, but even the President of the United States, see *United States* v. *Nixon*, 418 U.S. 683 (1974), the ability to close off judicial inquiry by the utterance of a "talismanic incantation," *U.S.* v. *Robel*, 389 U.S. 258, 263 (1967), whether it be "editorial function," "executive privilege," or "academic freedom." In all of these cases, however, courts exist to examine the cogency of the arguments made. The New Jersey Supreme Court examined Princeton's arguments at length and correctly found them without application to this case.

Appellee notes, moreover, that this Court has upheld access rules in regard to the electronic media in *Red Lion Broadcast-*

---

[13]The Supreme Court, 1979 Term, 94 HARV. L. REV. 171-72 ft. 23 (1980).

ing Co. v. *Federal Communications Commission*, 395 U.S. 367 (1969), and *CBS* v. *FCC*, 101 S.Ct. 2813 (1981). Appellee does not suggest that Princeton University is more like a television station than a daily newspaper, for his principal point is that these metaphors are profoundly irrelevant: Princeton University is neither a television station nor a newspaper. Appellant is a great private university on whose grounds its employees work and students live. Presumably Princeton's status as a university would not authorize it to deny access to union organizers acting under the authorization of the National Labor Relations Act or relevant state law. See, e.g., *Hudgens* v. *NLRB*, 424 U.S. 507 (1976); *Scott Hudgens*, 230 N.L.R.B. 414 (1977); Holland Rantos Co., 234 N.L.R.B. 726, *enforced* 583 F.2d 100 (3d Cir. 1978); *Eastex, Inc.* v. *N.L.R.B.*, 437 U.S. 556 (1978).

Princeton University requires over 3000 student-voters to live on its central campus, see Stipulated Facts D, J.S. 52a-53a, and 12, J.S. 59a, and that reality controls this case just as much as its status as an employer would control if this case concerned access to its employees. There is an overwhelming public interest in maximizing the free flow of information to voters to that they may cast their votes wisely, and States are entitled to withhold access to its trespass law by owners of private property, in certain circumstances, who do not take account of this interest.

Given the overwhelming nature of the public interest at stake, one would expect that Princeton could point to some substantial injury to its own interests sufficient to override those of appellee and the public. Not the least remarkable aspect of this case, however, is that Princeton throughout this entire litigation has never pointed to the slightest way in which access to its grounds by appellee, limited by suitable time, place, and manner restrictions, would infringe the operations of the University. In the press cases cited above, the newspapers at least presented plausible arguments that enforcement of the law would in fact affect their internal operations.

Here, on the contrary, Princeton is asserting an absolute freedom, unfettered by the need to present concrete argument, to exercise mastery over its campus.

The best evidence that appellee's access to the Princeton University campus does not infringe the University's operation is the fact that Princeton, subsequent to the initiation of this prosecution, changed its rules to allow access, subject to time, place, and manner restrictions. J.S. 2a ft. 2; Princeton Brief at 14. What Princeton wishes to argue is that that change was a matter of grace rather than a recognition of appellee's rights under the New Jersey Constitution, but surely the more central point is that Princeton is wholly without credibility (even if not legally estopped) in arguing that the decision of the Court concretely hinders the operations of the University.

For this Court to uphold the validity of the decision of the New Jersey Supreme Court does not in the least require cutting back on the First Amendment protection accorded academic freedom. That Court itself emphasized "giv[ing] substantial deference to the importance of institutional integrity and independence. Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain." J.S. 31a. But the Court rightly found that, given the circumstances of this case, all of Princeton's legitimate interests could be met by time, place, and manner restrictions of the kind subsequently adopted by the University, J.S. 33a.

The approach of the New Jersey Supreme Court was very similar to that adopted by this Court in the recent case of *Schad* v. *Mt. Ephraim*, ___ U.S. ___, 101 S. Ct. 2176 (1981), dealing with a municipal ordinance prohibiting live entertainment within the boundaries of the community:

> [T]he initial question in determining the validity of the exclusion . . . is whether live entertainment is 'basically incompatible with the normal activity [in the commercial zones.]' As discussed above, no evidence has been presented to establish that live entertainment is incompatible with the uses presently permitted by the Borough. Mount Ephraim asserts that it could have chosen to eliminate all commercial uses within its boundaries. *Yet we must assess the exclusion of live entertainment in light of the commercial uses Mount Ephraim allows, not in light of what the Borough might have done.* 101 S. Ct., at 2186 (emphasis added).

Similarly, the New Jersey Supreme Court looked not at what kind of educational philosophy Princeton University *might* adopt, but to the one it has adopted and professes. Thus the Court quoted Princeton's President William G. Bowen on "The Role of the University as an Institution in Confronting External Issues":

> Central to the philosophy of education is the proposition that the University has a responsibility to expose students and faculty members to a wide variety of views on controversial questions. . . .
>
> Put simply, the University's ability to carry out its basic educational mission requires an environment conducive to the maximum possible freedom of thought and expression for each individual student and faculty member. We are not talking, here about something that is merely desirable; we are talking about something that is essential. In this crucial respect, the University has a special role in the society — a special responsibility for creating a milieu in which every individual, whether the steadiest proponent of the majority viewpoint of [sic] the loneliest dissenter, is encouraged to think independently. J.S. 30a.

The essence of this notion of the University is that it does not express judgment about the merit of particular ideas so much as embrace the values of intellectual inquiry and self-examination as ends in themselves. The very purpose of the University, from this point of view, is therefore the free expression of ideas. One might contrast this not only with alternative conceptions of universities as places devoted to the inculcation of specific dogma, but also with such contemporary institutions as shopping centers, whose central purpose is commercial transactions. Yet even in this last case, this Court emphasized that California's decision that a shopping center could not use state trespass law to keep political speech out of a shopping center did not "unreasonably impair the value or use of [the] property as a shopping center." *Prune Yard Shopping Center* v. *Robins*, 447 U.S., at 83. With Princeton University, though, there can be no conceivable impairment of its use of its property, in the circumstances of this case, since Princeton's own designation of its purpose is to serve as a milieu for freedom of thought and expression.

Even if appellee misconceives Princeton's central purpose, and the University should profess itself uncomfortable with the substantive views expressed by appellee or other outsiders, its remedy is not invocation of the State's trespass law, but a simple disavowal of "any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Prune Yard* at 87.

Even if one assumes, contrary to fact, that state action is present, Princeton's claims to the protections of the First Amendment are wholly without merit. Perhaps other cases will genuinely call on this Court to balance the legitimate First Amendment rights of academic freedom or freedom of ideological association against interests asserted by the State. But

this case certainly does not, for Princeton University presents no interests that weigh at all, and the interest of the State that its law not be used as an instrument of stifling the freedom of its citizenry to engage one another in "consult[ation] for the common good," New Jersey Constitution, Article I, para. 18, is overwhelming.

IV. THE STANDARD ARTICULATED BY THE NEW JERSEY SUPREME COURT IS CLEAR AND SURVIVES ANY TEST ESTABLISHED BY THE "VOID-FOR-VAGUENESS" DOCTRINE.

The final argument of the University is that the New Jersey Supreme Court's three-part test, which requires future litigation to take into account "(1) the nature, purpose, and primary use of such private property, generally its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property," J.S. 27a, is "so vague and uncertain as to leave almost unbounded discretion in determining whether particular activities are 'discordant' or 'incompatible' with 'Princeton University's professed educational goals [and] the University's overall use of its property for educational purposes,' (JS 29a-30a). The application of such a vague and uncertain standard is clearly impermissible in this sensitive First Amendment area." Princeton Brief 16.

The first odd feature about Princeton's argument is that it is directed at a standard interpreting the New Jersey Constitution rather than at the Constitution itself. Presumably the University is unwilling to argue that either Article I, paragraph 6 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty

of speech or of the press . . . .") or Article I, paragraph 18 ("The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances") is itself unconstitutionally vague. *Compare* United States Constitution, Amendment I.

The standard enunciated by the New Jersey Supreme Court is not a statute — the usual subject of vagueness analysis — but rather a set of guidelines for future courts to follow as they balance New Jersey's sometimes competing commitments to freedom of speech, private property, and university autonomy. Indeed, the test established by the court below is quite close to that articulated by this Court in *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972):

> The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

It was this test that the court applied in *Schad* v. *Mt. Ephraim*, ____ U.S. ____, 101 S.Ct. 2176 (1981).

The New Jersey Supreme Court's test does require the exercise of judgment, as do the various tests enunciated by this Court in regard to the First Amendment. And the New Jersey test requires sensitivity to the actual realities of the situation, as did the application of the *Grayned* test in *Mt. Ephraim*, where this Court "assess[ed] the exclusion of live entertainment in light of the commercial uses Mount Ephraim allows, not in light of what the Borough might have done." *Mt. Ephraim*, *supra*, at 2186. That neither the New Jersey Supreme

Court nor this Court purports to apply mechanical tests does not, except within the ordinary uncertainties of human language, make those tests vague.

> "'[A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation,' *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 91 (1977), quoting *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). Performance of this task requires a particularized inquiry into the nature of the conflicting interests at stake. . . . " *Metromedia, Inc.* v. *City of San Diego*, 49 Law Week 4928 (July 2, 1981) (plurality opinion).

Princeton's argument in fact boils down to its objection that the New Jersey Supreme Court behaved like a court, carefully assessing the claims of the competing parties and articulating a standard requiring equally careful assessment, instead of simply accepting the University's unprecedented and insupportable claim to absolute autonomy. Princeton opposes such "particularized inquiry," of course, because such inquiry reveals the total lack of incursion on any genuine interest of the University. As in *Mt. Ephraim*, "no evidence has been presented to establish" that appellee Schmid's political expression "is incompatible with the uses presently permitted" by the University. 101 U.S., at 2186.

A primary use of the "void-for-vagueness" doctrine is to prevent criminal punishment applying a statute where persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). See Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). In recent years the doctrine has been used to strike down laws affecting speech for fear that persons wishing to engage in protected speech will be chilled by a vague statute. See, e.g. *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Smith* v. *Goguen*, 415 U.S. 566 (1974); *Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976). But

Princeton obviously does not face any risk of criminal prosecution, nor can Princeton claim in any cogent way that it is being chilled in asserting its views to the public. Indeed, Princeton's claim has nothing to do with speech. The University does not wish to speak against appellee Schmid, but rather to invoke the powers of the State to force him off Princeton's campus and thus prevent him from conveying his political views to willing student-voter listeners. It is hard to think of a case with less of a justifiable claim to the protection of the vagueness doctrine.

Princeton University has thus made no showing that any First Amendment interests it may concededly have are implicated by the decision of the New Jersey Supreme Court in this case.

V. THE STATES ARE FREE TO PROTECT INDIVIDUAL LIBERTIES EVEN WHERE THE FIRST AMENDMENT ARGUABLY DOES NOT, AND THE NEW JERSEY SUPREME COURT'S CONSTRUCTION OF ITS OWN CONSTITUTION VIOLATES NO RIGHT OF PRINCETON UNIVERISTY

Once it is recognized that Princeton asserts no plausible First Amendment claims in the circumstances of this case, then it is obvious that this case is squarely within *Prune Yard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), where the Court emphasized "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by Federal Consitition." *Id.*, at 81. See also U.S. Constitution, Amendment 10. Indeed, it would be an anomaly if a constitutional system which rests on the sanctity of the republican form of government, U.S. Constitution, Article IV, Section 4, did not authorize the States of the Union to exercise special care to preserve that form of government. That, of

course, is what the New Jersey Supreme Court did in the decision below, following the teaching of *Prune Yard*.[14]

Princeton attempts to distinguish *Prune Yard* by pointing to differences between a university and a shopping center. One of these differences, the commitment of universities to activity itself at times protected by the First Amendment, has been examined at length above and has been found to be without merit in the circumstances of this case. Indeed, an additional difference between Princeton and a shopping center is precisely the commitment of the former to providing a forum for unfettered intellectual discourse and examination of ideas. But there is at least one more crucial difference between Princeton and the PruneYard Shopping Center: No one lives at the PruneYard, whereas over 3000 student-citizen-voters are required to live, as well as work, on the University campus. J.S. 52a, 59a. New Jersey can thus honor its commitment to the priority of political speech, J.S. 22a, by withdrawing from a residential university, in the circumstances of this case, the

---

[14] The Supreme Court of Pennsylvania has joined the Supreme Courts of California and New Jersey in reaching a similar conclusion in regard to the Pennsylvania Constitution. Commonwealth of Pennsylvania v. Tate (July 14, 1981) reversed the conviction for "defiant trespass" of six persons who had peacefully distributed leaflets outside of a Muhlenberg College building in which Clarence Kelley, then director of the F.B.I., was speaking at a public symposium on crime prevention. The Court construed Article I, section 20 of the Pennsylvania Constitution, which gives citizens "a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance," to prevent invocation of Pennsylvania's trespass law in the circumstances of the case. After citing the New Jersey Supreme Court's decision in the instant case, the Pennsylvania Supreme Court went on to state, "Mindful of both this Commonwealth's great heritage of freedom and the compelling language of the Pennsylvania Constitution, we likewise hold that, in certain circumstances, the state may reasonably restrict the right to possess and use property in the interest of freedom of speech, assembly, and petition." Typed opinion, p. 14.

right to invoke New Jersey's general trespass law against appellee.

The New Jersey Supreme Court engaged in a thoughtful balancing of the rights of the parties and declared that New Jersey's "own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property," J.S. 27a, required that the balance be struck in favor of appellee's freedom of speech. Perhaps members of this Court, like the administration of Princeton University, disagree with the merits of New Jersey's traditions, but there is no warrant, in a Federal system, for overturning that assessment in the absence of a clear requirement from the United States Constitution that New Jersey be thus fettered.

No such requirement exists. Princeton's task is not to try to invoke Federal power where it is illegitimate to do so, but to try to convince the people of New Jersey of the unsoundness of their own traditions and consequent desirability of amending their constitution. It should go without saying that the First Amendment does protect Princeton in *that* effort, at least against infringement by the State.

Conclusion

For each of the reasons set forth above, the Court should dismiss this case for want of jurisdiction or, in the alternative, affirm the decision of the New Jersey Supreme Court.

Respectfully submitted,

Jerrold Kamensky
Counsel of Record
Tomar, Kamensky, & Smith, P.A.
194 South Broad Street
Trenton, New Jersey 08608
For the American Civil Liberties
Union of New Jersey

Sanford Levinson
University of Texas Law School
727 East 26th Street
Austin, Texas 78705
For the American Civil Liberties
Union of New Jersey
Attorneys for Appellee Chris Schmid

Of Counsel

Douglas Laycock
University of Texas Law School
727 East 26th Street
Austin, Texas 78705

Office - Supreme Court, U.S.
FILED
OCT 14 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF OF APPELLANT PRINCETON UNIVERSITY

NICHOLAS deB. KATZENBACH
Counsel of Record
THOMAS H. WRIGHT, JR.
Princeton University
318 Nassau Hall
Princeton, New Jersey 08544
(609) 452-5560

Attorneys for Appellant Princeton University

Of Counsel:
MICHAEL A. CANDIDO, JR.
MARGARET B. G. FREIBERG
Old Orchard Road
Armonk, New York 10504
(914) 765-1900

October 14, 1981.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT—

I. Princeton University has standing to appeal the decision below and its claims are not moot 1

A. Princeton has standing in its own right 1

B. Princeton's claims are not moot 3

C. The State of New Jersey has properly exercised its right of appeal 4

II. State action is clearly present here as it was in *Prune Yard* 6

III. Appellee does not dispute that Princeton is entitled to the protection of the First Amendment in its choice of educational policy 7

IV. The decision of the court below is constitutionally indefensible and appellee does not attempt to defend it 11

V. The New Jersey Constitution impermissibly injects government into content evaluation of expressive activity 13

CONCLUSION 14

TABLE OF AUTHORITIES

	Page
Cases	
Boston v. Jackson, 260 U.S. 309 (1922)	2
Busik v. Levine, 63 N.J. 351, 307 A.2d 571, *appeal dismissed*, 414 U.S. 1106 (1973)	2
City of Chicago v. Atchison, Topeka, & Santa Fe Railway, 357 U.S. 77 (1958)	2
Commonwealth v. Tate, —Pa.—, 432 A.2d 1382 (1981)	12
First National Bank v. Bellotti, 435 U.S. 765 (1978)	11
Linda R.S. v. Richard D., 410 U.S. 614 (1973)	3
Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)	12
Marsh v. Alabama, 326 U.S. 501 (1946)	11, 13
Montana v. United States, 440 U.S. 147 (1979)	3
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	3
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	6
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	2
Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979)	12, 13
Township of Washington v. Gould, 39 N.J. 527, 189 A.2d 697 (1963)	3
Wooley v. Maynard, 430 U.S. 705 (1977)	11
Constitutions, Statutes, and Court Rules	
U.S. Const. amend. I	*passim*
U.S. Const. amend. V	12
U.S. Const. amend. XIV	12
28 U.S.C. § 1257(2)	7
N.J. Const. art. I, para. 6	6
N.J. Const. art. I, para. 18	6
N.J. Const. art. VI, § 2, para. 3	2
Rules Governing the Courts of the State of New Jersey, Rule 2:3-2	2
Other Authorities	
Machlup, *Some Misconceptions Concerning Academic Freedom and Tenure*, 41 AAUP Bulletin 753 (1955), reprinted in *Academic Freedom and Tenure* 184 (L. Joughin ed. 1967)	8
Searle, *Two Concepts of Academic Freedom*, in *The Concept of Academic Freedom* 93 (E. Pincoffs ed. 1972)	10
Comment, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Cal. L. Rev. 1538 (1981)	7

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF OF APPELLANT PRINCETON UNIVERSITY

ARGUMENT

I. PRINCETON UNIVERSITY HAS STANDING TO APPEAL THE DECISION BELOW AND ITS CLAIMS ARE NOT MOOT.

A. Princeton has standing in its own right.

Princeton University appeared before the Supreme Court of New Jersey as intervenor at the invitation of the court (JA

4a; JS 5a).[1] It briefed the issues, appeared at oral argument, and unsuccessfully sought rehearing.[2] Appellee did not object at any stage to Princeton's role in the proceedings. The court below treated Princeton as a party under New Jersey law, and this Court must accept the New Jersey court's determination that state law authorized such participation.[3]

Although intervenor status appears to be somewhat unusual in criminal cases, the right of an intervenor to seek review in this Court of a lower court decision is well-established, having been recognized in both civil[4] and criminal[5] cases. Closely analogous to this case is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). There, a newspaper and two reporters were granted intervenor status by the Virginia trial court for the purpose of raising their First Amendment challenge to that court's order closing a criminal trial to the public. This Court heard and decided the case, with no suggestion that the newspaper, because of its intervenor status, had anything less

---

[1] JS ....., JA ....., PB ....., NJB ....., SB ..... and AB ..... refer throughout to the indicated pages of the Jurisdictional Statement, the Joint Appendix, the Brief of Appellant Princeton University, the Brief of Appellant State of New Jersey, the Brief of Appellee Chris Schmid, and the Brief *Amicus Curiae* of American Association of University Professors [AAUP], respectively.

[2] Appellee appears to take comfort from the omission of Princeton's name from caption of the decision below. (SB 9). He does not mention the fact that the caption of the court's order denying Princeton's petition for rehearing designated Princeton as "Intervenor-Movant" (JS 70a).

[3] *See Boston v. Jackson*, 260 U.S. 309, 313 (1922). To the extent appellee urges that the Supreme Court of New Jersey could not under New Jersey law allow Princeton to intervene he is also wrong. While there is no published rule expressly establishing intervention in criminal cases, the New Jersey Constitution (art. VI, § 2, para. 3) empowers the Supreme Court of New Jersey to make rules governing practice and procedure, and the court may exercise this power by case law rather than rule-making process, *see Busik v. Levine*, 63 N.J. 351, 307 A.2d 571, 577 (dictum), *appeal dismissed*, 414 U.S. 1106 (1973). *See also* Rule 2:3-2 of the Rules Governing the Courts of the State of New Jersey.

[4] *City of Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958).

[5] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

than the full rights of a party to pursue the matter before this Court.

Rather than accepting the fact that, as intervenor, Princeton was a party below, appellee continues to insist (SB 8-11) that Princeton lacks standing. He attempts to analogize this case to *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), which held that the mother of an illegitimate child lacked standing to seek an order enjoining the district attorney from refusing to prosecute the father for non-support. But the plaintiff's posture in that case was very different from Princeton's posture here.

Princeton does not complain that the State of New Jersey has refused to prosecute appellee—indeed, the State *has* prosecuted him. Nor does Princeton assert a private interest in appellee's being convicted or fined. Princeton's interest is not that the State force appellee to stay off Princeton's property; Princeton's interest is rather that the State *not* require *Princeton* to allow him *on* the property. Acceptance of appellee's defense necessarily gives rise to a corresponding legal obligation on the part of Princeton. No such reciprocal legal obligation was present in *Linda R.S.*

The significance of this fact is underlined by the probability that, given Princeton's full participation as intervenor below, New Jersey courts would hold Princeton estopped from relitigating the constitutional issue.[5a] Accordingly, Princeton should not now be barred from fully litigating its rights before this Court, when this may be its only opportunity to do so.

B. Princeton's claims are not moot.

Appellee argues (SB 12) that Princeton's claim is mooted by revisions to its access policy which Princeton made during the pendency of this litigation. But if this Court reverses the Supreme Court of New Jersey because the ground on which it relied violated Princeton's federal constitutional rights, the New

---

[5a] *Cf. Township of Washington v. Gould*, 39 N.J. 527, 189 A.2d 697 (1963); *Montana v. United States*, 440 U.S. 147 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Jersey court may reinstate Schmid's conviction for trespass. Moreover, Princeton's intervening revision of its access policy was an assertion, not an abandonment, of Princeton's First Amendment right to determine for itself when members of the general public shall have access to its property and under what circumstances and conditions. It is precisely that right which is at issue here; and to assert that Princeton's revised regulations are more consonant with the New Jersey Constitution as interpreted below and (presumably) that Schmid will comply with them is irrelevant.[6] Princeton cannot be held to have abandoned its constitutional right by exercising it. Furthermore, the decision below chills Princeton's freedom to make additional revisions in its access policy, now and hereafter.

C. The State of New Jersey has properly exercised its right of appeal.

Since Princeton has standing in its own right, it would make no difference to Princeton's standing if the State of New Jersey were, as appellee urges (SB 8), dismissed or realigned as a party. There is, however, no basis for doing so because the State has properly appealed.

Appellee makes two distinct arguments. First, he argues that there is no case or controversy between the State and Schmid. (SB 6-8). This conclusion rests on the fact that the State expresses no opinion on the federal constitutional question other than to attest its substantiality, and on appellee's contention that the State cannot properly appeal unless it can "point to a provision of the United States Constitution that protects the State of New Jersey from itself—*i.e.*, its own Constitution" (SB 7)—a novel argument.

The State believes a substantial constitutional question has been raised by Princeton and therefore has joined Princeton in

---

[6] Nor is it clear that the revised regulations are as consonant with the decision below as appellee believes; *e.g.*, the regulations *permit* rather than *require* Princeton to allow representatives of off-campus political or religious groups access to University facilities. (JS 3a n.2).

this appeal. The State is not asserting Princeton's First Amendment rights on Princeton's behalf; rather it is seeking clarification of how those rights affect the State's enforcement of its trespass law. (NJB 4). The State may properly be indifferent to the merits of Princeton's asserted rights, but it cannot be indifferent to enforcement of its own laws. The State may be bound by its supreme court's interpretation of New Jersey law, but it is not bound by that court's interpretation of the Federal Constitution. And merely to seek review by this Court of a federal constitutional interpretation by the court below, the State need not assert some independent constitutional right of its own.

To say there is no case or controversy between the State and Schmid is to assume an answer in Schmid's favor to the federal constitutional question presented. If the provisions of state law as construed and applied below are constitutionally valid, then the State has no power to prosecute. The case or controversy which previously existed is disposed of as a matter of law. If, however, federal law renders the state constitutional provisions invalid, then there remains a case or controversy under state law. The truth or falsity of the assumption depends on this Court's answer to the substantive question presented, which is precisely why the State has appealed. (NJB 4).

Appellee urges secondly that the State somehow lost its standing to appeal when it lost its conviction of Schmid in the court below. He argues that the State cannot "gain standing by asserting itself as representing *parens patriae* those citizens of New Jersey who might wish to challenge the constitutionality of the New Jersey Constitution under the United States Constitution." (SB 7). Obviously the State takes no such position, for the reason that it need not find any new basis for its standing. It appears here, as it appeared below, in its capacity as sovereign enforcing its own criminal statute.

II. STATE ACTION IS CLEARLY PRESENT HERE AS IT WAS IN *PRUNEYARD.*

Schmid argues that Princeton's First Amendment rights were not violated because the required element of state action was not present. (SB 15-18). Schmid, however, misperceives the nature of Princeton's grievance. Princeton does not argue that the failure to uphold Schmid's trespass conviction of itself violates Princeton's First Amendment rights. Rather, it is the action of the Supreme Court of New Jersey in interpreting and applying the state constitution so as to grant Schmid a right of access to the Princeton campus that gives rise to Princeton's federal constitutional claims.

The court below's reversal of Schmid's conviction was based on its construction of paragraphs 6 and 18 of Article I of the New Jersey Constitution. As interpreted by the Supreme Court of New Jersey, those provisions "affirmatively guarantee[ ] to individuals the rights of speech and assembly." (JS 24a). On the basis of that interpretation, the court reversed Schmid's conviction for trespass, concluding that he had "suffered a constitutional impairment of his State constitutional rights of speech and assembly." (JS 33a).

There can be no doubt as to the substance of the court's holding; its effect is to mandate that Princeton allow Schmid access to its grounds for the purposes of distributing literature. It is only on this basis that Schmid's conviction was reversed. Since the decision of the state court necessarily rests upon its rejection of a federal constitutional claim, this Court has jurisdiction. It is equally clear that a state requirement of access, whether the source is found in the state constitution, in a state statute, or elsewhere, is state action.

In this respect, the holding of the Supreme Court of New Jersey is no different from the holding of the Supreme Court of California which this Court reviewed in *Prune Yard Shopping Center v. Robins,* 447 U.S. 74 (1980). There the Supreme Court of California had held that the California Constitution created a right of speech and petition in shopping centers and

had reversed the decision of the lower court which had denied injunctive relief against the shopping center. In reaching its decision, the California court rejected a contention that this state-created right infringed on federal constitutional protections. This Court held that the case properly was before it as an appeal under 28 U.S.C. § 1257(2), and implicitly found the obligation imposed by the state constitution to be state action.

III. APPELLEE DOES NOT DISPUTE THAT PRINCETON IS ENTITLED TO THE PROTECTION OF THE FIRST AMENDMENT IN ITS CHOICE OF EDUCATIONAL POLICY.

While both appellee and *amicus curiae* American Association of University Professors take exception to the use of the phrase "academic freedom" to describe Princeton's constitutionally protected educational autonomy, they do not explicitly deny the existence of Princeton's First Amendment right. They simply object to describing this right as "academic freedom" because they contend that history and scholarship give that term a different meaning. They argue that it refers exclusively to the rights of teachers to professional freedom from both state and private intrusion in their teaching, and they perceive any institutional claim to "academic freedom" as derived from, and merely representative of, this individual right of professors; that is, as protecting from governmental interference the teaching freedom of the institution's faculty.[6a] (SB 18-21; AB 2-3, 5, 9-10).

The history and reputation of Princeton as a university attest to its devotion to the pursuit of truth by its faculty and students free from both public *and* private interference. But this case does not involve the internal private rights of either

---

[6a] *But see* Comment, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Cal. L. Rev. 1538, 1546-51 (1981) (Courts should recognize, as a corollary to the First Amendment, a right of "institutional academic freedom" which does not exist only to protect individual faculty members' rights).

faculty or students vis-à-vis the university administration.[7] It involves the constitutional right of all elements of the private university—administration, faculty, and students alike—to govern themselves and their relationship with strangers free of state direction and control. Princeton contends that the university, not the state, should determine the rules and regulations which govern the expressive activities of strangers on Princeton's campus, and that doing so in accordance with institutional self-government serves Princeton's educational purposes.

The "academic freedom" which is the First Amendment's "special concern" is freedom from governmental intrusion into the academic process.[8] In a public university, the administration's control over the academic process can be viewed as state action, and in some circumstances may infringe the individual rights of those who teach (and those who learn) to do so without public interference. But the same conceptual problem does not exist in the case of private universities, because the action of the university administration is not state action. However labeled, the right of a private university to determine its educational policy in accordance with its own internal processes without governmental interference stems directly from the First Amendment.[9] While both appellee and

---

[7] Appellee states in his Brief that "[h]ere, of course, it is the University administration that claims the right to impose the strait jacket upon its student body." (SB 25 n.10). This is unsupported by anything in the record. And it is a strange argument for appellee to make, in view of his contention that the internal "decision making process is utterly irrelevant. . ." (SB 22 n.9)

[8] We do not dispute that the term is also used, quite properly, in a non-constitutional sense to refer to private interference with teaching. And we wish to emphasize that Princeton agrees with Professor Machlup that academic freedom must be defended "against pressures from all quarters—including professors themselves," and that "trustees and administrators, no less than sovereigns and governors, should share with professors and students in the defense of academic freedom." *See* Machlup, *Some Misconceptions Concerning Academic Freedom,* 41 AAUP Bulletin 753 (1955), *reprinted in Academic Freedom and Tenure* (L. Joughin ed. 1967) at 184.

[9] Of course, Princeton, like any other person, would be bound by any voluntary contractual limitations on its First Amendment rights. When *amicus* AAUP suggests that Princeton would offer its First Amendment rights as a defense to tenure and other breach of contract claims asserted by the faculty (AB 27-28), it grossly misreads Princeton's argument. Here, the state police power is involved.

amicus argue that on the facts of this case "academic freedom" is not an issue, we do not understand them to deny the existence of Princeton's First Amendment right. They do deny that the New Jersey Constitution as interpreted by the court below unconstitutionally interferes with that right. (SB 39; AB 11-16).

The conclusion that confining Princeton to regulating the time, place and manner of strangers' expressive activities on its campus does not interfere with its educational policy is based upon what that policy is. If Princeton encourages student exposure to widely varying viewpoints how can it complain about Mr. Schmid's activities? (JS 29a-30a; SB 34-35). Both appellee and *amicus* concede that other, less catholic, institutions might with reason seek to regulate more than the time, place, and manner of outsiders' activities on campus, but they urge that Princeton cannot assert the claims of others. (SB 12-14, 13 n.6, 21; AB 14-15, 19). That totally misses Princeton's point.

There appears to be no disagreement that the First Amendment protects Princeton's choice of its educational policy. Nor is it suggested that Princeton uses its property for anything other than the implementation of that policy, the realization of educational goals. The fact that Princeton is committed to exposing students to widely different viewpoints does not give its educational choice less constitutional protection than a narrower or more doctrinaire one.[10] Conceding that less catholic educational institutions might have reason to object to the decision below, appellee adjudges their objections

[10] Nor would that choice in and of itself compel Princeton to admit Mr. Schmid to express his views on its campus. Implementation of that choice through an invitational rule avoids censorship while insuring that some member or members of the university community believe the invitee is a worthy spokesman of the views he or she espouses.

"more plausible" than Princeton's. (SB 13). But how can the legitimacy of governmental intrusion depend upon the particular educational philosophy in fact chosen? Why should Princeton's property be governmentally subjected to greater intrusion by strangers *because* it has chosen a particular philosophy than would otherwise have been the case?

That access by strangers to the facilities of Princeton is at least broadly related to Princeton's educational mission is not really disputed. The court below conceded as much when it measured Schmid's expressive activities against Princeton's educational philosophy. (JS 29a-31a). Princeton, rightly or wrongly, believed that its educational objectives were best served by requiring strangers who wished to engage in expressive activities on its property to be invited by a member of the University community to do so. Yet the court below rejected the invitational rule because, in the judgment of the court, activity like appellee's was consonant with Princeton's educational use of its property. Thus, the court substituted its own judgment for Princeton's judgment as to what uses of Princeton's property would further the educational objectives of Princeton's faculty and student body.

It is a disservice to education to treat a college campus as though it were a downtown area or a shopping center. The very authorities relied on by appellee uphold the university's need to regulate the expressive conduct that occurs on its campus:

> [B]ecause the university is an institutional embodiment of free inquiry and scholarship, it is something quite different from such public areas as parks and streets. It therefore requires regulation of the mode of exercise of the general freedoms of a libertarian society in order to protect its special functions. (This gives us the sorts of regulations of the rights of students and faculty that are necessary to keep the university from turning into Trafalgar Square.)[11]

The conditions of access are thus for the university, not for the state, to determine.

---

[11] Searle, *Two Concepts of Academic Freedom*, in *The Concept of Academic Freedom* 93 (E. Pincoffs ed. 1972).

IV. THE DECISION OF THE COURT BELOW IS CONSTITUTIONALLY INDEFENSIBLE AND APPELLEE DOES NOT ATTEMPT TO DEFEND IT.

Many of the arguments in appellee's brief are arguments that this Court should not review the decision below on the merits. (SB 6-15). When he does discuss the merits, appellee seeks to narrow the decision below, change its rationale, and make it dependent on facts which were explicitly rejected by the Supreme Court of New Jersey.

The thrust of appellee's arguments on the merits is that students live on the Princeton campus, that most of them are voters, and that accordingly it is a legitimate exercise of state police power in implementation of free political speech to insure that students are politically informed. (SB 26-28, 32, 40-41). The argument was made below in an effort to extend *Marsh v. Alabama,* 326 U.S. 501 (1946), to residential universities and was not accepted by the Supreme Court of New Jersey. (JS 15a).

A state law which infringes First Amendment freedom of expression is justified only if it is supported by a *compelling* countervailing interest and is *closely drawn* to avoid unnecessary abridgment of the First Amendment right.[11a] *E.g., First National Bank v. Bellotti,* 435 U.S. 765, 786 (1978); *Wooley v. Maynard,* 430 U.S. 705, 715-17 (1977). The problem with appellee's argument as the basis for the exercise of state police power is that the court below did *not* justify appellee's access to the campus on the basis of a need to communicate political views to resident student voters. It explicitly found that no such need existed (because of the extent to which strangers have

---

[11a] *Amicus curiae* AAUP contends that the state action at issue here was not "arbitrary." (AB 12-13). But where, as here, a statute derogates First Amendment rights, more than mere rationality is required of it.

access to students in frequented public places).[12] Nor did the court below limit its rule to protecting expression of political viewpoints on public issues. Nor did it confine its rule to residential universities. Nor did it, as appellee implies, simply require "that outside participants, under suitable restrictions on time, place, and manner, may *sometimes* be allowed to convey their views to *willing* students outside the classroom or the protected special space of the university."[13] (SB 30a) (emphasis added).

---

[12] The court noted that the "numerous public areas [contiguous to University property] apparently furnished to members of the public, as well as the college community, ample alternative locations other than the property of the University itself as a means for the dissemination and exchange of information[,] views, and ideas." (JS 14a). It went on to hold that "the presence of such alternatives will not eliminate the constitutional duty [imposed by the New Jersey Constitution]" to reasonably accommodate speech and assembly by outsiders. (JS 28a). The same view has since been expressed by the Supreme Court of Pennsylvania in *Commonwealth v. Tate*, —Pa.—, 432 A.2d 1382, 1391 n.15 (1981) (adequacy of alternative, public forums would not relieve private college of its obligation under the Pennsylvania Constitution to allow access to strangers for leafleting; it would bear only on the reasonableness of any time, place, and manner restrictions imposed by college). In contrast, in *Robins v. Prune Yard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 345, 347 (1979), *aff'd*, 447 U.S. 74 (1980), the adequacy or inadequacy of alternative channels of expression was deemed material in deciding whether to subject a private property owner to a similar obligation. (The court specifically cited the decline of downtown shopping districts as producing a need for a public right of expression in private shopping centers.) See also *Lloyd Corp. v. Tanner*, 407 U.S. 551, 566, 567 (1972) ("It would be an unwarranted infringement of [property owner's Fifth and Fourteenth Amendment rights] to require them to yield to the exercise of First Amendment rights where adequate alternative avenues of communication exist.")

[13] Both appellee and *amicus* assume that the court below confined its decision to the open campus and that it is not applicable to the classrooms or other "protected special space." (SB 30a; AB 18). Probably the Supreme Court of New Jersey would uphold otherwise permissible place and manner restrictions which reflected such a distinction. But there is nothing in the opinion below which would require that interpretation. Classrooms and lecture halls are used by non-faculty speakers invited by student organizations for lectures to which the general public is often invited. Presumably, that "property" is, conceptually, subjected to the same "affirmative obligation" of the state constitution. (JS 23a).

In short, appellee's argument is inapplicable to the case at bar, and he has not found any other basis on which to defend the decision below.

V. THE NEW JERSEY CONSTITUTION IMPERMISSIBLY INJECTS GOVERNMENT INTO CONTENT EVALUATION OF EXPRESSIVE ACTIVITY.

Princeton contends that the New Jersey Constitution as interpreted forces courts to evaluate the content of protected speech to determine the reach of the State's police power. The court below's interpretation of the New Jersey Constitution is particularly offensive in this connection because it forces not only courts but also law enforcement officials to massive evaluation of the content of speech—the speech of the property owner as well as that of the intruder—before the trespass laws can be invoked. Since each instance is different from its predecessors, consistency would be hard to achieve. Further, there would always be a temptation for law enforcement officials to find speech of which they approved consistent with the public and private use of property and speech of which they disapproved inconsistent. Substituting governmental judgments for private ones in these circumstances violates the First Amendment because it injects government into content evaluation over a broad spectrum of expression. This is a crucial difference between the New Jersey court's interpretation of its constitution in this case and the California court's interpretation of its constitution in *Robins v. Prune Yard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). If private property is, for reasons of public policy, to be subjected to an affirmative obligation to permit expressive activities, then the criteria for such an affirmative obligation should be neutral as to content. That is the approach of the California court in *Prune Yard* and of this Court in *Marsh*.

CONCLUSION

The decision of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

NICHOLAS deB. KATZENBACH
Counsel of Record
THOMAS H. WRIGHT, JR.

Princeton University
318 Nassau Hall
Princeton, New Jersey 08544
(609) 452-5560

Attorneys for Appellant
Princeton University

Of Counsel:

MICHAEL A. CANDIDO, JR.
MARGARET B. G. FREIBERG
Old Orchard Road
Armonk, New York 10504
(914) 765-1900

October 14, 1981

Office-Supreme Court, U.S.
FILED
AUG 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY AND STATE OF NEW JERSEY,
Appellants,

vs.

CHRIS SCHMID,
Appellee.

On Appeal from the Supreme Court of New Jersey

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Of Counsel:
JULIUS G. GETMAN
Law School
Yale University
New Haven, Connecticut 06520

WILLIAM VAN ALSTYNE
School of Law
Duke University
Durham, North Carolina 27706

WALTER P. METZGER
Department of History
Columbia University
New York, New York 10027

THOMAS M. SCANLON, JR.
Department of Philosophy
Princeton University
Princeton, New Jersey 08544

MATTHEW W. FINKIN
School of Law
Southern Methodist University
Dallas, Texas 75275
Attorney for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
QUESTION PRESENTED	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. In the American Setting, Academic Freedom and an Institution's Administrative Autonomy Are Related but Essentially Different Concepts..	4
II. No Impermissible Invasion of Institutional Autonomy Was Worked by the New Jersey Supreme Court	11
A. The Decision Below Did Not Interfere with Any Educational Policy or Program of Princeton University	11
B. The Decision Below Did Not Invade Institutional Autonomy as a Buttress for Academic Freedom	16
III. The Judicial Process Does Not Impermissibly Invade Institutional Autonomy in Determining Whether a Particular Political Solicitor's Access to a Campus Would Be Inconsistent with the Institution's Educational Objectives	20
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
AAUP (Bloomfield College Chapter) v. Bloomfield College, 322 A.2d 846 (N.J. Super. 1974), *aff'd.*, 346 A.2d 615 (App. Div. 1975)	28
Ambach v. Norwick, 441 U.S. 68, n.6 at 76 (1979)	11
Baggett v. Bullitt, 377 U.S. 360 (1964)	17
Barenblatt v. United States, 360 U.S. 109 (1959)	17, 23
Berea College v. Kentucky, 211 U.S. 45 (1908)	21
Drans v. Providence College, 383 A.2d 1033 (R.I. 1978)	27
EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. den. —— U.S. —— (1981)	25
Farmington v. Tokushige, 273 U.S. 284 (1927)	11
Greene v. Howard University, 221 F. Supp. 609 (D.D.C. 1967), *rev'd*, 412 F.2d 1128 (D.C. Cir. 1969)	28
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 507 (1952)	22
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	17, 18
Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978)	27
Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980)	14
Meyer v. Nebraska, 262 U.S. 390 (1923)	11
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	18
Mutual Film Corp. v. Ohio Industrial Comm'n, 236 U.S. 230, 245-246 (1915)	22
New Jersey—Philadelphia Presbytery of the Bible Presbyterian Church [Shelton College] v. New Jersey Board of Higher Education, 482 F. Supp. 968 (D.N.J. 1980), *aff'd*, —— F.2d —— (3rd Cir. 1981)	24
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	11, 24
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	15
Regents of the University of California v. Bakke, 438 U.S. 265, 311-315 (1978)	17

TABLE OF AUTHORITIES—Continued

Page

Shelley v. Kraemer, 334 U.S. 1 (1948) 21
Shelton College v. State Board of Education, 48 N.J. 501, 226 A.2d 612 (1967) 24
Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) 8, 17, 23
The Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 598-599 (1819) 12
The Trustees of Dartmouth College v. Woodward, 65 N.H. 472, 502 (1891 reprinted ed.) 11
United States v. Seeger, 380 U.S. 163 (1965) 21
Vidal v. Girard's Executors, 2 Howard 127 (1844) .. 12
Weiman v. Updegraff, 344 U.S. 183 (1952) 17
Wisconsin v. Yoder, 406 U.S. 205 (1972) 21

CONSTITUTIONAL REFERENCES

Constitution of the United States
First Amendment ..... *passim*
Fourteenth Amendment 11
Constitution of New Jersey 20

STATUTES

Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e 17 (1977) 25
Internal Revenue Code, 26 U.S.C. § 501(c)(3) (1977) 14, 22

AAUP STATEMENTS

1915 *General Report on Academic Freedom and Academic Tenure in* ACADEMIC FREEDOM AND TENURE 155, L. Joughin, ed. (1969) 1, 7
1940 *Statement of Principles on Academic Freedom and Tenure* in AAUP POLICY DOCUMENTS AND REPORTS 1 (1977) 1, 9
A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments, 67 Academe 27 (1981) 25

TABLE OF AUTHORITIES—Continued

BOOKS — Page

L. Barrett, STATE CONTROL OF PRIVATE INCORPORATED INSTITUTIONS OF HIGHER EDUCATION (1926) 24

J. Brubacher and W. Rudy, HIGHER EDUCATION IN TRANSITION—A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES (1976) 6

E. Freund, THE POLICE POWER (1904) 24

H. Friendly, THE DARTMOUTH COLLEGE CASE AND PUBLIC PRIVATE PENUMBRA (1969) 11

D. Grant and D. Riesman, THE PERPETUAL DREAM: REFORM AND EXPERIMENT IN THE AMERICAN COLLEGE (1978) 29

D. Henry, CHALLENGES PAST, CHALLENGES PRESENT: AN ANALYIS OF AMERICAN HIGHER EDUCATION SINCE 1950 (1975) 24

Hofstadter and Metzger, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955) 5, 6, 7

P. Lazarfield and W. Thielens, THE ACADEMIC MIND (1958) 24

A. Levine, WHEN DREAMS AND HEROES DIED: A PORTRAIT OF TODAY'S COLLEGE STUDENT (1980) .. 13

R. MacIver, ACADEMIC FREEDOM IN OUR TIME (1955) 9, 18, 23

R. Reid, AMERICAN DEGREE MILLS (1959) 27

J. Sanders, COLD WAR ON CAMPUS: ACADEMIC FREEDOM AT THE UNIVERSITY OF WASHINGTON, 1946-64 (1979) 23

L. Vesey, THE EMERGENCE OF THE AMERICAN UNIVERSITY (1965) 7

ARTICLES

Berea College, Kentucky: An Interesting History (1883) 22

Bok, *The Federal Government and the University*, 58 The Public Interest 80, 81-82 (1980) 17, 27

Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 Yale L.J. 979, 986 (1957) 12

TABLE OF AUTHORITIES—Continued

	Page
Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 Iowa L. Rev. at 1124-1159 (1980)	27, 28
Finkin, *Some Thoughts on the Powell Opinion in Bakke*, 65 Academe 192, 196 (1979)	28
Fuchs, *Academic Freedom—Its Basic Philosophy, Function and History*, 28 Law & Contemp. Problems 431, 433 (1963)	9
Irons, *"Fighting Fair": Zechariah Chafee, Jr., the Department of Justice, and the "Trial at the Harvard Club,"* 94 Harv. L. Rev. 1205 (1981)	7
Kirkland, *Academic Freedom and the Community* in FREEDOM AND THE UNIVERSITY 115 (1950)	14
Metzger, *Academic Freedom in Delocalized Institutions*, in DIMENSIONS OF ACADEMIC FREEDOM 1, 5 (1969)	15
Metzger, *Academic Tenure in America: A Historical Essay* in FACULTY TENURE (Commission on Academic Tenure in Higher Education) 93, 96 (1973)	5, 6
Metzger, *The German Contribution to the American Theory of Academic Freedom*, 41 AAUP BULL. 214, 217 (1955)	6
Morris, *The University of Washington Loyalty Oath Case*, 50 AAUP BULL. 221 (1964)	23
Oaks, *A Private University Looks at Government Regulation*, 4 J. College and Univ. Law 1 (1976)	29
O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. Cincinnati L. Rev. 525, 545 (1975)	29
The Open Universities in South Africa	8, 17
A Program for Renewed Partnership: The Report of the Sloan Commission on Government and Higher Education, 116 (1980)	9
Regulations and Standards for Program Approval and Licensing of Higher Education in the State of New Jersey (1975)	25

TABLE OF AUTHORITIES—Continued

	Page
Report of Committee A, 1980-1981, 67 Academe 176 (1981)	25
Rockwell, *Academic Freedom—German Origin and American Development*, 36 AAUP BULL. 225 (1950)	6
Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. Pa. L. Rev. 328 (1963)	13
Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty* in THE CONCEPT OF ACADEMIC FREEDOM 59-60 (E. Pincoffs, ed. 1975)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1576

PRINCETON UNIVERSITY AND STATE OF NEW JERSEY,
Appellants,

vs.

CHRIS SCHMID,
Appellee.

On Appeal from the Supreme Court of New Jersey

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

INTEREST OF THE AMICUS CURIAE

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals, and welfare of teachers and research scholars in American colleges and universities. Commencing with the 1915 *General Report on Academic Freedom and Academic Tenure* (1915 *Declaration*) and culminating in the 1940 *Statement of Principles on Academic Freedom and Tenure* (1940 *Statement*), the Association's paramount concern has been the articulation of standards governing academic freedom and tenure in American higher education.

The instant case presents this Court with novel and sweeping claims to institutional autonomy and academic freedom under the First Amendment. The claims, if embraced wholesale, would go far to insulate private institutions of higher education from scrutiny by government—state or federal—virtually without regard to the compatibility of the particular constraint with the educational enterprise. As the primary proponent of the

American theory of academic freedom, the AAUP believes that it is uniquely situated to address this Court as *amicus curiae* in this case.

QUESTION PRESENTED

Whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

SUMMARY OF ARGUMENT

There is much to commend in Princeton University's general concern for institutional freedom from the arbitrary exercise of governmental power, and the value of academic freedom. *Amicus* AAUP and Princeton University agree as to the importance of academic freedom to the individual teacher. *See* Brief of Princeton University, n. 12 at 9. But the difficulty with the precise claims advanced lies in their lack of differentiation between an institution's need for autonomy when it functions as a university, *i.e.* in making educational decisions, and its interest in maintaining administrative control over the territory it occupies.

Legal protection for institutional autonomy can be grounded either on a policy of tolerance of different kinds of institutions, or on the need to protect academic freedom. On the one hand, religious (or political) groups have long had a recognized right to maintain institutions that exist to transmit established "truths." Princeton asserts that such institutions have a prerogative to measure virtually every utterance on their property against a sectarian yardstick. Princeton finds this prerogative, which it asserts under the general head of "academic freedom," to have been offended by the decision below.

This argument mistakes institutional pluralism for academic freedom. Academic freedom is a scholar's right to be free of institutional (or governmental) con-

trol in professional utterance. The dissemination only of established truths is the antithesis of academic freedom. Princeton's "academic freedom" claim cannot be accepted without doing violence to the meaning of the term.

Moreover, the decision below gives ample scope to institutional pluralism and idiosyncrasy. The New Jersey Supreme Court held that the purpose of the particular expressive activity must be measured against the private purpose to which the institution is dedicated. The court conscientiously adverted to the value of institutional autonomy in instructing how these factors are to be weighed. In the absence of an authentic case, involving an institution that *does* impose a religious or ideological test for on-campus expression, it remains to be seen whether the New Jersey Supreme Court would extend the expressive easement of the state constitution as far as Princeton suggests.

On the other hand, legal protection of institutional autonomy can derive from academic freedom in the authentic sense. Any direct governmental infringement of the freedom of teaching, learning, and investigation, is an assault upon the autonomy of institutions dedicated to academic freedom. In addition, universities perform functions, such as the selection of faculty, that are inexorably intertwined with the exercise of academic freedom. Freedom *of* the university is required at certain points in order to protect freedom *in* the university. But in no way does the decision below invade the autonomy necessary to protect academic freedom, either directly or derivatively. The decision does not limit or affect what may be taught, how it will be taught, or who will teach it.

In the most far-reaching of the arguments presented, Princeton asserts that any judicial examination of its reasons for excluding a speaker would independently invade institutional autonomy. External inquiry *can* be impermissibly intrusive depending upon the purpose of

the inquiry, the procedural safeguards afforded, and the likely impact upon academic freedom or the conduct of educational affairs. But if it is unconstitutional simply to be called upon to explain how educational goals would be offended by more liberal rules governing speaker access to the campus's public areas, how much more unconstitutional is being called upon to explain the failure to reappoint a faculty member, challenged under Title VII, or to explain the reasons for a dismissal of a faculty member challenged as a breach of the institution's contractual commitment to academic freedom and tenure. It will not do, in the latter case, to suggest that the institution need only abide by its own standards. In the latter case, as in the instant case, the infirmity lies in a judicial determination of what the standards *are* that the institution did adopt. *Amicus* AAUP believes the standards laid down below are adequately protective of a university's integrity.

ARGUMENT

I. IN THE AMERICAN SETTING, ACADEMIC FREEDOM AND AN INSTITUTION'S ADMINISTRATIVE AUTONOMY ARE RELATED BUT ESSENTIALLY DIFFERENT CONCEPTS

Princeton University argues to a syllogism: The major premise is that, as this Court has recognized, "academic freedom" is a subset of the freedoms encompassed by the First Amendment. The minor premise is that private institutions of higher education should, as institutions, be understood to enjoy academic freedom. The conclusion: any interference by government with an institution's academic freedom must be viewed as a violation of the First Amendment. Brief of Princeton University, Section I(A); *see* also Brief of the American Council on Education (ACE) and the National Institute of Independent Colleges and Universities as *amici curiae* at 11-12 (arguing to the state's intrusion on Princeton's academic freedom) (hereinafter Brief *amicus curiae* of ACE).

This argument confuses two closely related but essentially different concepts—an individual scholar's academic freedom and an institution's administrative autonomy. It is easy to identify one with the other, for they have a common origin in the medieval university and, in the American setting, institutional autonomy, when rightly invoked, has been thought of as a necessary, but ancillary, protection for a faculty's academic freedom.

The medieval university was a guild, a corporation. The intellectual freedom of the medieval scholar existed within the limitations of that self-governing community, sometimes in conflict with an authoritative system of faith. *See generally*, R. Hofstadter and W. Metzger, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, Ch. I (1955) (hereinafter Hofstadter & Metzger). As Walter Metzger explains, medieval scholars

> sought *immunity* from the reach of power and a corporate *autonomy* that would empower them to assist and defend themselves. The principal immunity they sought was to be exempt from the jurisdiction of temporal (and often ecclesiastical) tribunals in criminal and civil legal actions. The key to the autonomy they sought was to gain through the device of incorporation . . . —above all—to enact the rules and regulations to which they and those who dealt with them had to conform.

Metzger, *Academic Tenure in America: A Historical Essay* in FACULTY TENURE (Commission on Academic Tenure in Higher Education) 93, 96 (1973) (emphasis in the original) (hereinafter *Academic Tenure*).

With the rise of the Nation State and the eclipse of ecclesiastical by secular authority, the continental university had to yield some of its autonomy to state control. Its inhabitants, however, continued to seek freedom of scholarship. In nineteenth century Germany the ideal of academic freedom—*Akademische Freiheit*—developed

and eventually was transplanted, with modification, to American shores. Hofstadter & Metzger, *supra* Ch. VIII ("The German Influence"). *See, also,* J. Brubacher and W. Rudy, HIGHER EDUCATION IN TRANSITION—A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES 1636-1976, Ch. 15 (3d ed. 1976). The German concept referred to *Lerhfreiheit* (the freedom of the professor to teach, inquire, and publish) and *Lernfreiheit* (the freedom of the student in the learning process). Significantly, the administrative context in which this "academic freedom" was exercised continued to embody a considerable residue of the medieval heritage of corporate autonomy.

> No lay board of control was interposed between the ultimate authority of the state and the plenary powers of the professors. No elaborate administrative structure was required; no office of the president was established. The German universities were state institutions, but the combination of governmental restraint, limited professorial co-option, elected administrators and cultural isolation gave them the appearance, and a good deal of the reality, of self-governing academic bodies.

Metzger, *The German Contribution to the American Theory of Academic Freedom*, 41 AAUP Bull. 214, 217 (1955). *See also* Rockwell, *Academic Freedom—German Origin and American Development*, 36 AAUP Bull. 225 (1950).

When American scholars sought to transplant the German ideal, they confronted a very different legal structure. Despite early experiments with faculty control, American institutions swiftly came under the control of lay governing boards and presidents chosen by the lay boards. As Metzger puts it, "In the medieval university, inside confronted outside; in the American college, outside was ensconced within." *Academic Tenure* at 115.

Professors were subject to dismissal when they disagreed with the president, trustees, or influential donors, upon religious, economic, or political questions; the tacit assumption was that the institution had a right to demand instruction in the beliefs espoused by those who control it. *See generally* Hofstadter and Metzger *supra* Ch. IX, and L. Vesey, THE EMERGENCE OF THE AMERICAN UNIVERSITY 384-418 (1965). *See e.g.* Irons, *"Fighting Fair": Zechariah Chafee, Jr., the Department of Justice, and the "Trial at the Harvard Club,"* 94 Harv. L. Rev. 1205 (1981) (a recent review of the efforts of influential alumni of the Harvard Law School to secure Chafee's dismissal). The freedom generally sought by American academics was not a collective freedom of the institution from external control, but an individual scholar's freedom from the institution's legally constituted governing authority.

The American theory, crystalized in the seminal 1915 *General Report on Academic Freedom and Academic Tenure*, had to confront the stark fact that "outside was ensconced within." *See, generally*, Hofstadter & Metzger, *supra* at 407-412. The American theorists did so by attending first to the nature of the institution and second to the nature of the academic calling. An occasional institution was, by its charter, committed to the propagation of specific doctrine and was therefore reviewed as being morally (if not legally) "proprietary," in which case the theorists thought it appropriate only to impose a duty of candor to the public.[1] But in the vast majority

---

[1] 1915 *Declaration* in ACADEMIC FREEDOM AND TENURE 155, 159 L. Joughin, ed. (1969):

> If a church or religious denomination establishes a college to be governed by a board of trustees, with the express understanding that the college will be used as an instrument of propaganda in the interests of the religious faith professed by the church or denomination creating it, the trustees have a right to demand that everything be subordinated to that end. If, again, as has happened in this country, a wealthy manufacturer establishes a special school in a university in order

of cases, institutions of higher education function for the common good, not for a narrow sectarian purpose; they exist to advance the sum of human knowledge. As a remonstrance later relied upon in Mr. Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957), aptly put it:

> In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—'to follow the agrument where it leads' . . . . The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.

THE OPEN UNIVERSITIES IN SOUTH AFRICA 10 (1957). It is essential that individual scholars at these institutions be free of control by institutional authority in performing their professional duty, save only that they be subject to a professional standard of care.

The distinction between morally "propriety" institutions, and institutions that are dedicated to academic

---

to teach, among other things, the advantages of a protective tariff, or if, as is also the case, an institution has been endowed for the purpose of propagating the doctrines of socialism, the situation is analogous. All of these are essentially proprietary institutions, in the moral sense. They do not, at least as regards one particular subject, accept the principles of freedom of inquiry, of opinion, and of teaching; and their purpose is not to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators, but rather to subsidize the promotion of the opinions held by the persons, usually not of the scholar's calling, who provide the funds for their maintenance. Concerning the desirability of the existence of such institutions, the committee does not desire to express any opinion. But it is manifestly important that they should not be permitted to sail under false colors. Genuine boldness and thoroughness of inquiry, and freedom of speech, are scarcely reconcilable with the prescribed inculcation of a particular opinion upon a controverted question.

freedom, was carried over in the 1940 *Statement*. "Institutions of higher education," it states, "are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition." 1940 *Statement* in AAUP POLICY DOCUMENTS AND REPORTS 1, 2 (1977 ed.) The 1940 *Statement* does provide that "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment," reflecting the distinction dealt with in greater detail in the 1915 *Declaration*. The provision does not constitute an approval of limitations on academic freedom, but merely requires that they be made public. See *Interpretive Comment* No. 3 appended to the 1940 *Statement* in 1970 by the AAUP and the Association of American Colleges. AAUP POLICY DOCUMENTS AND REPORTS, *supra* at 3.

In sum, while the *immunity* of the individual scholar—to return to medieval origins—took on new meaning in the American setting, the *autonomy* of the corporate body, now under lay control, has been thought of as a necessary but distinctly ancillary support for the scholar's academic freedom. Fuchs, *Academic Freedom—Its Basic Philosophy, Function and History*, 28 Law & Contemp. Problems 431, 433 (1963); *cf.*, A PROGRAM FOR RENEWED PARTNERSHIP: The Report of the Sloan Commission on Government and Higher Education, 116 (1980). The critical difficulty with reliance upon a theory of corporate autonomy as an aspect of academic freedom *simpliciter* is found precisely in the shift in control of the corporate body from the professoriate to external authority. As Robert MacIver wrote of the 1950s, the attack on academic freedom had often been "aided and abetted, sometimes even led" by boards of trustees who should have invoked their institution's autonomy as a shield against such attack. R. MacIver, ACADEMIC FREEDOM IN OUR TIME, 271 (1955).

Thus, it becomes important to distinguish the concept of institutional autonomy, at issue in the instant case, from the concept of academic freedom as it has developed and been refined. Princeton University is not invoking its autonomy in defense of the freedom of its faculty to teach or do research in the face of some impermissible governmental intervention. Nor is it invoking its autonomy, as a derivative of the faculty's academic freedom, to insulate curricular choice or the selection of faculty from impermissible external constraint. *See* Section II(B), *infra*. The assertion rather is that a private institution of higher education is, under the head of "academic freedom," free "to indoctrinate students in a particular ideology or set of beliefs" Brief of Princeton University at 8.

It is Princeton's argument that a private institution of higher education has a right to be unfree: to be a place where faculty, students, and even casual visitors to the campus are required to be faithful to the established doctrines of the institution; to be a place where no voice may be heard on its property, even on its sidewalks, commons, or parking lots, speaking contrary to officially established truths; in fine, to be the kind of place the academic profession decried in the 1915 *Declaration*. It may well be that private institutions are at liberty to be agencies of dogma and doctrine. *See* Section II(A), *infra*. But institutional autonomy invoked for such a purpose—as a countermine to academic freedom—cannot rightly be claimed, as Princeton does, under the head of academic freedom.[2]

---

[2] *Cf.* Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty* in THE CONCEPT OF ACADEMIC FREEDOM 59-60 (E. Pincoffs, ed. 1975):

> Gresham's law, that "bad money tends to drive out good money," applies equally to catchwords as it does to currency. Bad usages tend to drive out good usages and by much the same sort of process . . . . [T]he process begins with the inflation of rhetoric, and it ends with the debasement of meaning.

II. NO IMPERMISSIBLE INVASION OF INSTITUTIONAL AUTONOMY WAS WORKED BY THE NEW JERSEY SUPREME COURT

A. The Decision Below Did Not Interfere With Any Educational Policy or Program of Princeton University.

In a series of decisions over fifty years ago, this Court recognized that private educational institutions should be free of undue governmental interference in their educational affairs. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farmington v. Tokushige*, 273 U.S. 284 (1927). These decisions rest upon a general right of parents to provide for the education of their children, as well as a more particular right of religious and ethnic groups to provide for instruction congenial to their beliefs and culture. In addition, drawing by analogy to the general protection of economic liberty under the Fourteenth Amendment, this Court recognized the institutions themselves as having an interest in their continuing ability to offer instruction; and the faculty members who offer instruction in them were also recognized as having a sufficient occupational interest to trigger constitutional scrutiny of the reasonableness of the challenged governmental action.

At root, these decisions are founded in a policy of tolerance, given the pluralistic character of American society. *Cf.* H. Friendly, THE DARTMOUTH COLLEGE CASE AND PUBLIC PRIVATE PENUMBRA 30 (1969), and *Ambach v. Norwick*, 441 U.S. 68, n. 6 at 76 (1979). That policy long antedates the adoption of the Fourteenth Amendment. In fact, much of the argument in the Dartmouth College case itself concerned the special status at common law of private eleemosynary corporations, and the educational implications of permitting a private university to be controlled by the state. *See* the argument of Jeremiah Mason before the New Hampshire Supreme Court, *The Trustees of Dartmouth College v. Woodward*, 65 N.H. 472, 502 (1891 reprinted ed.) ("If our semi-

naries of learning are to be reduced, to a state of servile dependence on the legislatures . . . to answer the occasional purposes of prevailing political parties, all hope of their future usefulness must be abandoned."), and of Daniel Webster before this Court, *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 598-599 (1819) ("It will be a dangerous, a most dangerous experiment to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinion . . . . Party and faction will be cherished in the places consecrated to piety and learning.") So too, Chief Justice Marshall's opinion reflects acute concern for the educational aspects of the case. *Id.* at 634, 646. To similar effect, in the first Girard College case, *Vidal v. Girard's Executors*, 2 Howard 127 (1844), this Court refused to void a deed of trust that *inter alia* prohibited any minister from holding office in the school or from even setting foot on the premises. The decision over that hotly debated provision "has been hailed as one of the first pronouncements of the American policy on nonsectarian schools." Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 Yale L.J. 979, 986 (1957).

But the state is not forbidden to regulate at all. What is prohibited is only such regulation that the Court has characterized as "arbitrary." In reality, given the policy underpinning this doctrine, what is prohibited are those restrictions that prevent the institution from carrying out its basic educational mission, *i.e.*, instruction in religion, in the German language, or in Japanese language and culture.

Nothing in the decision below works an impermissible invasion of Princeton's institutional autonomy under this limb of the theory. To be sure, Princeton has a valid administrative interest, recognized by the New Jersey Supreme Court, in maintaining order on the campus, and in assuring that there is no disruption of its educational activities. But what was offensive to the New

Jersey Constitution was not any regulation relevant to these ends, but simply a permit requirement that left access to the campus for peaceful political solicitation to hinge wholly upon standardless administrative discretion—in the absence of an invitation by some campus person or group. *Cf.* Van Alstyne, *Political Speakers at State Universitities: Some Constitutional Considerations*, 111 U. Pa. L. Rev. 328 (1963). The New Jersey Supreme Court was rather at pains to approve Princeton's current rules, which stringently regulate the time, place, and manner of solicitation for political purposes so to avoid any disruption of Princeton's educational activities. *State v. Schmid*, *supra* n. 2 at 617.

Nor can the state policy pursued be said to be arbitrary. Although this element of the case will doubtless be developed in the brief on behalf of Mr. Schmid, it ought simply be noted that Princeton is a residential community closely intertwined with the town itself. Accordingly, political parties have a strong interest in reaching the resident student body; and the students themselves have an interest in hearing a variety of views. See A. Levine, WHEN DREAMS AND HEROES DIED: A PORTRAIT OF TODAY'S COLLEGE STUDENT 34 (1980) ("The real impact of the student vote is being felt at the state and local level. Student enrollment exceeds the incumbent's margin of victory in 91 U.S. Congressional districts in 33 states . . . . According to college administrators, more political candidates than ever before are coming to campus to ask students for their votes.").

More important, nothing in the interpretation of the New Jersey Constitution below comes even remotely close to compelling Princeton to deviate from its educational mission. Indeed, at no time does Princeton suggest in what way its mission or educational program is altered as a result of the decision.[3] The only consequence oc-

[3] Princeton points out that the prior policy (as well as the current one) was approved by a Council representing administrators, faculty and students, presumably as evidence of a broad

casioned by the decision below is that in order to invoke an exemption from the free speech clause of the New Jersey Constitution an institution is required to announce what it is that it does profess that would be inconsistent with allowing a speaker to have access. This is of conceivable importance only to an institution that makes different professions to different constituencies; for example, that proclaims freedom without while practicing constraint within. But it is scarcely an impermissible infringement to ask an institution to reveal its doctrinal commitments if it seeks an exemption recognized by law. *See e.g.* 29 U.S.C. § 501(c)(3) (1977) discussed in Section III *infra*. Even the draftsmen of the 1915 *Declaration*, in refusing to hold that morally proprietary institutions should not exist, saw nothing amiss in requiring them to be candid about their ideological commitments.

What Princeton asserts are the rights of some other, hypothetical and very different kind of institution. An institution that cherishes academic freedom does not vouch for the truth or wisdom of every utterance of its faculty, let alone every utterance on its property. Inherent in the process of sifting and winnowing ideas, much that is false—even nonsensical—is necessarily assayed. *See* Kirkland, *Academic Freedom and the*

---

consensus of the college community as a whole on the need for those rules. Brief of Princeton University, n. 17 at 14. The American Council on Education argues even more strongly that such a consensus "reached through a lively and wide ranging internal debate" should be deferred to. Brief of *amicus* ACE at 13.

Of course, faculty action on educational matters is of considerable significance, inasmuch as the faculty should be primarily responsible for the conduct of the institution's educational mission. *See Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980). But there is no evidence in the record of the nature of the faculty's awareness of the issues presented in the approval of those rules, of its degree of concurrence in them, or whether the Council as a whole merely acted *pro forma* to endorse what was thought of as purely a matter of administrative housekeeping.

Community in FREEDOM AND THE UNIVERSITY 115 (1950). Unlike a shopping center, which is merely "unlikely" to be identified with the ideas expressed by pamphleteers on its property, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), adherence to academic freedom acts as a profession of institutional neutrality. Metzger, *Academic Freedom in Delocalized Institutions*, in DIMENSIONS OF ACADEMIC FREEDOM 1, 5 (1969) ("By no stretch of analogy was the modern university to be considered a missionary society, a propaganda agency, an arm of a political party: it was a residence, a hothouse, a sanctuary—the figures were adoring, but they left the university with nothing of substance to proclaim.")

Accordingly, what Princeton posits are the rights of some other institution; one that *is* a missionary society or an agency of propaganda. The decision below, Princeton argues, would impermissibly curtail such an institution's right to measure every utterance on its property against its own doctrinal yardstick. In the absence of a real case, however, it suffices to say that the New Jersey Supreme Court seems conscientiously to have accounted for just such a situation in the criteria it adopted. The court held that the right of access hinged *inter alia* upon the "nature, purposes, and primary use" of the property and the "purpose of the expressional activity" in relation to the private purpose. *State v. Schmid*, *supra* at 630. Thus the Court inquired of whether the expressional activity was "discordant *in any sense* with both the private and public uses" of the campus; more particularly, whether the expression was "incompatible with . . . Princeton University's professed educational goal . . ." *Id.* at 631 (emphasis added). It seems rather clear that the Court was at pains to exempt from the reach of the New Jersey Constitution expressive activity which *is* discordant with the private purpose or with some professed educational goal that would be infringed by the particular expression.

To the same end, Princeton argues that education—in the broadest conceivable sense—occurs outside the classroom "on the walkways and grounds of the campus" in exchanges between and among students and faculty. Brief of Princeton University at 13. In other words, the ambiance of a campus may contribute to an "atmosphere" conducive to the institution's particular educational goals. *Id.* An institution may, for example, wish to maintain a predominantly pastoral setting, restricting the tumult of political activity to specially reserved areas—just as Princeton has; or, it may wish to be virtually a monastic community, excluding all political activity from the campus in order to wall itself off from the world. But nothing in the decision below upsets this prerogative. It seems quite clear that the first and second prongs of the test adopted below—the nature of the private purpose of the property and the extent and nature of the public's invitation to use the property—account for each of these cases. A political solicitor in the first case would be restricted to the areas established by the institution, and, in the second, would be excluded altogether. Thus the balancing mandated by the New Jersey Supreme Court appears to be no less sensitive to this claim than to an ideological one.

It is here that Princeton makes its most arresting argument: the decision of what uses are compatible with the purposes to which the institution is dedicated cannot be for a court to make. In essence, Princeton argues that the very process of examining the content of the institution's educational policy is impermissibly intrusive of institutional autonomy. This argument will be dealt with separately in Section III, *infra*.

B. The Decision Below Did Not Invade Institutional Autonomy As a Buttress for Academic Freedom.

With the advent of the governmental loyalty-security programs of the 1950s, this Court confronted the constitutional status of the individual faculty member's claim of academic freedom as against external, govern-

mental interference. This Court recognized academic freedom as a subset of the First Amendment in these circumstances. *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Baggett v. Bullitt*, 377 U.S. 360 (1964); and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Largely unaddressed in these decisions was the relationship of the individual teacher or scholar's academic freedom to the liberty of the institution, recognized three decades earlier in *Meyer*, *Pierce* and *Tokushige*.

The connection between the two was drawn, however, in Mr. Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, *supra* at 255. Mr. Justice Frankfurter stressed the value of academic freedom, which requires "the exclusion of governmental intervention in the intellectual life of a university," *Id.* at 262. He adverted specifically to a then recent South African remonstrance:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

Id. at 263. *See also* Bok, *The Federal Government and the University*, 58 The Public Interest 80, 81-82 (1980).

Accordingly, when the state intrudes into these areas of a university's intellectual life, it erodes a necessary buttress for the protection of academic freedom.[4] In this

---

[4] Mr. Justice Powell took this view in his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-315 (1978). However, the South African remonstrance, quoted by Mr. Justice Frankfurter, merely harkens back to the medieval idea of the *studium generale* where students from all parts of the Western world were welcome. THE OPEN UNIVERSITIES IN SOUTH AFRICA 14 (1957). It did not concern the rather different problem of a

sense, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), is on point. A university that cherishes academic freedom—public or private—commits its classrooms to the pursuit of truth. As this Court said in *Keyishian v. Board of Regents*, *supra* at 603:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Just as the State may not commandeer a publisher's printing press, so may it not commandeer an institution's classrooms to impose a pedagogical orthodoxy.[5]

But *Tornillo* does not support Princeton's position here. The State of New Jersey has not commandeered Princeton's classrooms. It has merely refused to apply its Law of Trespass to enforce Princeton's former rules governing access to public areas of the campus, areas that were otherwise fully amenable to stranger political solicitation either by invitation of any student group or upon administrative permit. It is important to repeat, as Robert MacIver earlier observed of speaker bans, "The campus is neither a schoolroom nor a barracks." R. MacIver, ACADEMIC FREEDOM IN OUR TIME 212 (1955). Princeton elides a crucial distinction between

---

constitutional constraint upon a system of racially *preferential* admissions. Accordingly, *amicus* AAUP's own Brief in support of the University in *Regents of the University of California v. Bakke*, *supra*, while stressing the educational value of student diversity, declined to assimilate a program of preferential admissions as an aspect of academic freedom.

[5] Moreover, the freedom of the press guaranteed by the First Amendment is the publisher's freedom—he owns the printing press. Academic freedom, in the authentic sense, is the teacher's or scholar's freedom, not the "owner" of the classroom. *See* Section I, *supra*. To just the same effect, *Tornillo* does speak of an impermissible intrusion on the function of editors. But there has been no intrusion here on the function of the faculty.

its functional autonomy as an educational institution, and its territorial autonomy, as a proprietor of private property. The New Jersey Supreme Court has not construed the free speech clause of that state's constitution to require Princeton to install Mr. Schmid as a member of the faculty, to purchase or store Schmid's pamphlets in its library, to inscribe his works on its reading lists, or to treat his ideas in any way in any institutional offering. But these are the kinds of functions that define Princeton as an educational institution in contradistinction to a shopping center. A university makes a truly different kind of claim to autonomy—a functional rather than a territorial claim—when it advances its right to control the access of persons to its rosters and ideas to its syllabi. These are the kinds of freedoms Mr. Justice Frankfurter adverted to in *Sweezy*; but nothing in the decision below works any interference with them.

To be sure, there may be institutions so doctrinally regimented as to treat the campus as the functional equivalent of a barracks, so to channel every expression on campus through an ideological filter. There may, *arguendo*, even be an institution somewhere that treats the campus as a schoolroom though *amicus* is aware of none; that is, where every expression on campus is regulated not for ideological purity but somehow for pedagogical value. In either event, the New Jersey Supreme Court seems rather at pains to stress that private or educational purposes could defeat a claim of access. *See* Section II(A) *supra*. But Princeton has not asserted that either is the case here. Instead, Princeton asserts that being required to show what educational goals are being impaired is an independent infringement of Princeton's autonomy. That argument is dealt with in Section III, *infra*.

III. THE JUDICIAL PROCESS DOES NOT IMPERMISSIBLY INVADE INSTITUTIONAL AUTONOMY IN DETERMINING WHETHER A PARTICULAR POLITICAL SOLICITOR'S ACCESS TO A CAMPUS WOULD BE INCONSISTENT WITH THE INSTITUTION'S EDUCATIONAL OBJECTIVES

Princeton rightly points out that the test adopted by the New Jersey Supreme Court requires a court to determine whether the particular expression is inconsistent with the institution's educational purposes. In order so to do, the court must first ascertain what the institution's professed educational purposes are. Accordingly, Princeton objects to that inquiry on four grounds: (1) judicial deference, in the event the content of the utterance is discordant with religious or ideological doctrine, would constitute state action limiting speech upon non-neutral grounds, which the state is constitutionally forbidden to do; (2) the test adopted below impermissibly substitutes a judicial for an institutional determination of what the institution's educational goals are; (3) the standard adopted is unconstitutionally vague; and, (4) the very process of being required to explain how its educational purposes would be defeated by allowing access is an independent infringement of institutional autonomy. None of these grounds is tenable.

It is part of the organic law of the State of New Jersey that, "every person may freely speak, write and publish sentiments on all subjects . . ." and that no law shall abridge that liberty. N.J. Const. (1947), Art. I, para. 6. The state's highest court has construed that policy as encompassing an expressive easement upon the public areas of certain private properties. However, the state has declined to extend that easement where it would defeat the religious, ideological or educational purposes or uses of the property. Nothing in the federal constitution forbids the state so to defer, even if the state could not adopt a religious or ideological test for access to its own educational institutions. If such a declination is unconstitutional then the constitution will

have consumed itself: any deference to pluralism would, by that logic, be impermissible. But the declination to extend a state compulsory school attendance law where enforcement would conflict with religious belief does not amount to establishment of religion. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972). Nor does deference to religious belief for the purposes of conscription. *United States v. Seeger*, 380 U.S. 163 (1965). Whatever the reach of *Shelley v. Kraemer*, 334 U.S. 1 (1948)—which, though not cited in the brief, surely supplies the doctrinal foundation for Princeton's argument—it should not be extended to the point of a virtual *reductio ad absurdum*.

By the same token, the function of the inquiry is not to substitute a judicial for an institutional judgment of educational purposes and goals, but to ascertain what those purposes and goals are as a necessary predicate for determining whether deference is due. So, too, in *Wisconsin v. Yoder, supra*, this Court was called upon "to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent." *Id.* at 215. Noting that "a determination of what is a 'religious' belief or practice . . . may present a most delicate question," *id.*, the Court nevertheless was compelled to proceed to that determination. If inquiry into the content and authenticity of religious belief does not violate a constitutional prohibition upon free exercise of religion, neither does the constitution forbid inquiry into the content of institutional policy in order to defer to religious, ideological or educational objections to particular speaker access.[6]

---

[6] In the one case that does touch upon this issue, *Berea College v. Kentucky*, 211 U.S. 45 (1908), this Court simply ignored the College's own profession of what its educational mission was. The state had enacted a law forbidding the instruction of whites and blacks mingled together. This Court's majority took the law to be an amendment to the charter of Berea College, which amendment, the Court observed, would be impermissible if it defeated or substantially impaired the object of the charter. *Id.* at 57. No such

Neither are the standards adopted below unconstitutionally vague. As Mr. Justice Frankfurter pointed out in his concurrence in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 507 (1952), words that "gain 'precision from the sense and experience of men'" are not impermissibly vague. *Id.* at 519 (citing *Mutual Film Corp. v. Ohio Industrial Comm'n*, 236 U.S. 230, 245-246 (1915), referring *inter alia* to the term "educational" as such a word). (The Internal Revenue Code, for example, exempts from federal income taxation corporations that are conducted for "religious, charitable . . . or educational purposes," 26 U.S.C. § 501(c)(3) (1977), necessarily requiring a governmental determination of whether a particular institution is authentically so conducted.) The institution, if it wishes to exclude the speaker, need only articulate what religious, ideological or educational purpose is offended by allowing access. In other words, the standard adopted below gains precision from the institution's own "sense and experience."

To be sure, being called upon by some external agency to provide an explanation can be an impermissible invasion of institutional autonomy. But even in the area of the selection of faculty, one of the "four essential freedoms" inextricably tied to academic freedom, not *every* inquiry by the state constitutes an impermissible inva-

---

impairment was found, the Court concluded, for instruction to both races could still be imparted—only separately. (Mr. Justice Harlan dissented, largely on the impermissibility of a racial distinction drawn by state law.)

As Berea College had long made abundantly clear, it viewed racial integration (and co-education) as integral, indeed critical to its mission. BEREA COLLEGE, KENTUCKY: AN INTERESTING HISTORY (1883). These innovations were, to put it mildly, highly controversial in that part of the country at that time. *Id.* Thus the Court simply disregarded the College's plainly professed educational goals. Under the decision below, however, the purpose of the inquiry is not to determine whether the policy of the state should override the institution's educational mission—which is what the Court determined in *Berea College*—but precisely to defer to the educational mission.

sion. The permissibility of external inquiry turns upon the purpose of the inquiry—its compatibility with the academic enterprise—the availability of procedural safeguards for the institution, and the likely impact of the inquiry upon academic freedom and the conduct of educational affairs.

On the one hand, the legislative security investigations of the 1950s were designed essentially to cast public obloquy upon academics whose past associations or political beliefs were then deemed suspect. *See generally* R. MacIver, ACADEMIC FREEDOM IN OUR TIME Ch. XI (1955), and A. Morris, *The University of Washington Loyalty Oath Case*, 50 AAUP Bull. 221 (1964) (and the extensive sources noted therein). *See also* J. Sanders, COLD WAR ON CAMPUS: ACADEMIC FREEDOM AT THE UNIVERSITY OF WASHINGTON, 1946-64 (1979) (for a more recent case study). Although this Court later came to decry any governmental effort to "cast a pall of orthodoxy over the classroom" in dealing with disclaimer affidavits, the Court took a narrower view of legislative investigation. Examination of the contents of a particular lecture was held to be impermissible in *Sweezy v. New Hampshire, supra*; but, inquiry into a former graduate student's affiliations was not. *Barenblatt v. United States, supra.* In the latter case, AAUP as *amicus curiae* explicitly argued that the process of investigation was an impermissible invasion of institutional autonomy; that the procedure was an *in terrorem* device to chill the free play of ideas and to restrain the hiring and retention of politically controversial faculty.[7] Subsequent

---

[7] Brief *amicus curiae* of the American Association of University Professors in *Barenblatt v. United States, supra*:

> One of the essential preconditions of academic freedom—of freedom in teaching and research—is unhampered control by the university over employment and dismissal of its faculty.
>
> * * * *
>
> Once this key is surrendered to an external body, be it public or private, the university becomes an adjunct and dependency

study has indicated that these ends were largely achieved. P. Lazarfield and W. Thielens, THE ACADEMIC MIND Ch. 2 (1958). As the former President of the University of Illinois recently observed, "Certainly the ebullience of colleges and universities during the early postwar years was modified by the realities of the fifties." D. Henry, CHALLENGES PAST, CHALLENGES PRESENT: AN ANALYSIS OF AMERICAN HIGHER EDUCATION SINCE 1950, 96 (1975). In that case, the purpose and effect of the process of inquiry were bluntly antithetical to academic freedom, and the procedural safeguards for error or abuse during the investigative process were, to say the least, minimal.

But on the other hand, the states have traditionally reserved the power to regulate institutional degree-granting authority in order to prevent fraud upon the public. *See* L. Barrett, STATE CONTROL OF PRIVATE INCORPORATED INSTITUTIONS OF HIGHER EDUCATION Ch. II (1926), and E. Freund, THE POLICE POWER §§ 266-267, 479 (1904). New Jersey has done so since 1912. See *Shelton College v. State Board of Education*, 48 N.J. 501, 226 A. 2d 612 (1967). (New Jersey's law was supported by Woodrow Wilson as President of Princeton, and later signed by him as Governor. *Id.* at 619.) It has never been suggested that such a requirement, necessarily involving state scrutiny of the quality of faculty and educational programs, was *per se* an impermissible invasion of an institution's autonomy. *Pierce v. Society of Sisters*, *supra* at 534. *Compare Shelton College v. State Board of Education*, *supra* with *New Jersey—Philadelphia Presbytery of the Bible Presbyterian Church [Shelton College] v. New Jersey Board of Higher Edu-*

---

of that body, and loses its *raison d'être* as an arbor for the cultivation of new ideas. Once this key is surrendered, academic freedom disappears. Direction of curriculum and instruction, honesty in speech and publication—all that stands in need of academic freedom and justifies it—rest upon the principle of autonomy. Brief at 8-9.

cation, 482 F. Supp. 968 (D.N.J. 1980), *aff'd.* F.2d (1981). The standards applied reflect minimal academic requirements. *See e.g. Regulations and Standards For Program Approval and Licensing of Higher Education in the State of New Jersey* (1975). The process of inspection is geared toward that end, and judicial process is available to correct error, abuse, or a violation of First Amendment rights.

To be sure, there are less easily cabined situations. Title VII of the Civil Rights Act of 1964, as amended, forbids employers, including institutions of higher education, from discriminating in employment on certain proscribed grounds. 42 U.S.C. § 2000-e 17 (1977). The purpose of the intrusion is not inconsistent with generally recognized academic standards, for a discriminatory renewal decision is plainly not one made on academic grounds; but the very process of civil litigation, especially the effect of unrestrained pre-trial discovery, has been thought to chill the collegial character of reappointment and tenure decisions. Accordingly, the AAUP has proposed that a qualified testimonial privilege should be recognized for faculty participants to the reappointment process. *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, 67 Academe 27 (1981). In other words, the process of litigation can be "fine tuned," consistent with the Federal Rules of Civil Procedure, to achieve the statutory objective, while according a proper measure of institutional autonomy. *See Report of Committee A 1980-1981*, 67 Academe 176 (1981) (Part V "On Judicially Compelled Disclosure"). *Cf. EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), cert. den. —— U.S. —— (1981) (declining to exempt religious institutions from the reach of Title VII, but disallowing inquiry into the *bona fides* of a religious test for employment, and stressing the availability of a full trial as a protection for the institution).

The role of Title VII illustrates the basic infirmity in Princeton's argument. In the instant case, the purpose of the inquiry is not to impose an external judgment of what the institution's educational objective should be, but merely to ascertain what those objectives *are* in order expressly to defer to the institution should political speech be discordant with them. In fact, the New Jersey Supreme Court was at pains to stress the principle of institutional autonomy:

> [W]e must give substantial deference to the importance of institutional integrity and independence . . . . The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. . . . Hence, private colleges and universities must be accorded a generous measure of autonomy and self-governance if they are to fulfill their paramount role as vehicles of education and enlightenment.

State v. Schmid, *supra* at 632 (citations omitted). In sum, the purpose of the inquiry is scarcely inconsistent with educational objectives, the manner in which inquiry is made, affording full due process, is fully protective of the institution, and the impact is entirely consistent with academic freedom.

If judicial inquiry for such a purpose is an impermissible breach of institutional autonomy, it should follow that judicial inquiry into the selection, retention and promotion of faculty under Title VII—drawing upon the much closer relationship of that activity to academic freedom—in which an institution's reasons for denying reappointment might well be rejected as unfounded or pretextual, is *a fortiori* an impermissible invasion of institutional autonomy. "Yet even a die-hard opponent of federal regulation will concede," writes President Bok, "that the courts should prevent universities from discriminating against professors because they are black . . . . The problem is where to draw the line. How much autonomy should universities have in carrying out their

academic functions?" Bok, *The Federal Government and the University*, 58 The Public Interest 80, 82 (1980).[8] To the same effect, if the inquiry implicated here is a violation of institutional autonomy, so *a fortiori* would be an inquiry for the purposes of determining whether educational quality warrants approval of degree-granting authority. In that case, the state is not merely ascertaining what the institution's policies are, but is free to deny degree-granting authority upon an assessment of the educational program. Yet few would argue that the state should be helpless to protect the public from degree mills. *See generally* R. Reid, AMERICAN DEGREE MILLS (1959).

Indeed, the logic of Princeton's position would exempt the courts from jurisdiction even to adjudicate breach of contract claims by faculty. Invariably, these claims turn upon the meaning of institutional rules and professional usage. *See generally*, Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 Iowa L. Rev. at 1124-1159 (1980). The precise content of academic "tenure," for example, is not abundantly clear when the operative institutional document does little more than adopt that phrase. *Id. See e.g. Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978) and *Drans v. Providence College*, 383 A. 2d 1033 (R.I. 1978). The constitutional infirmity alleged here is that the decision below impermissibly admits of *any* judicial scrutiny of an institution's educational policies in order to ascertain whether allowing access would be inconsistent with those policies: "those rules are geared to Princeton's educational policy, and it is constitutionally wrong for state officials to determine what that policy is or what

[8] In fact, it is uncertain whether the decision of the New Jersey Supreme Court is actually one regulating the university's "academic functions" at all; that is, in the absence of an educational justification by the university for a rule that conditions political solicitation upon a standardless permit requirement, it remains to be seen whether the rule is one that has an educational justification. *See* Section II(A), *supra*.

activities are consonant with it." Brief of Princeton University at 18-19. In the contract case as well, the court is compelled to determine what the standards are that the institution has adopted so as to decide whether the institution has abided by them. *See, e.g., AAUP (Bloomfield College Chapter) v. Bloomfield College*, 322 A.2d 846 (N.J. Super. 1974) *aff'd.*, 346 A.2d 615 (App. Div. 1975). If the infirmity in the instant case lies in the very process of scrutiny and explanation, so *a fortiori* must the same process be infirm in a contract case: the issue at stake affects the institution's freedom to select and retain faculty—one of the "four essential freedoms" adverted to earlier; and, unlike the instant case, the court properly is free to reject the institution's construction of its own policies. *Id.* Indeed one court refused to construe an institution's rules against the institution precisely on grounds of institutional autonomy. *Greene v. Howard University*, 271 F. Supp. 609, 615 (D.D.C. 1967). But that case was reversed in what has become the leading decision on the contract rights of private university faculty. *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969) (per McGowan, J.). *See* Finkin, *Regulation by Agreement: The Case of Private Higher Education*, *supra* at 1124-1159. Were Princeton's argument to be accepted, however, an institution that embraced academic freedom as part of its rules would nevertheless be free to dismiss an outspoken or politically controversial faculty member without there being any recourse to the state courts. The institution could assert, in the very terms Princeton argues here, that its "rules [providing for academic freedom and tenure] are geared to its educational policy, and it is constitutionally wrong for state officials to determine what that policy is or what activities are consistent with it." [9]

---

[9] This is the basic infirmity in identifying institutional autonomy *simpliciter* with academic freedom. *See* Section I, *supra*. *See also* Finkin, *Some Thoughts on the Powell Opinion in Bakke*, 65 Academe 192, 196 (1979) pointing to the implications of that identification:

In sum, the purpose and procedure of the inquiry does no real violence to institutional autonomy. Neither is there any serious assertion that the impact will be deleterious.[10]

To be sure, America's colleges and universities find themselves, as never before in the Nation's history, enmeshed in the web of the administrative state. It is only natural, indeed desirable, that they should look to the Constitution as a shield when their vital need for educational autonomy is threatened. The problem, however, lies in distinguishing the permissible from the impermissible for constitutional purposes. *Compare* Oaks, *A Private University Looks at Government Regulation*, 4 J. College and Univ. Law 1 (1976) with O'Neil, *God*

Inasmuch as no nexus between the exercise of academic freedom and the claim of autonomy need be shown, the interests insulated are not necessarily those of teachers and researchers but of the administration and the governing board; the effect is to insulate managerial decision-making from close scrutiny, even in cases where the rights or interests of the faculty might be adverse to the institution's administration.

[10] In terms of harmful consequences, Princeton had argued in its Jurisdictional Statement that rather than subject themselves to judicial examination of their educational philosophies, New Jersey's private colleges will simply exclude the public altogether from their campuses. *Id.* at 12. In other words, in lieu merely of explaining what ideological or educational objectives are threatened by permitting a political speaker to have access to the campus, an institution would rather wall itself off entirely from the community of which it had heretofore been an integral part. *Amicus* AAUP, respectfully, cannot conceive of the decision below having such an effect. It suffices to say that that argument is not reiterated in Princeton's Brief and has, apparently, been abandoned.

Amicus ACE argues, however, that the impact of the decision below will dampen educational innovation. (Brief of ACE at 14-18.) *Amicus* AAUP believes that this position is plainly insupportable. In terms of the major movements of educational experimentation, the public sector—which is constrained by the First Amendment for the purposes of speaker access—has been no less effervescent than the private sector. *See generally*, D. Grant and D. Riesman, THE PERPETUAL DREAM: REFORM AND EXPERIMENT IN THE AMERICAN COLLEGE (1978).

and Government at Yale: The Limits of Federal Regulation of Higher Education, 44 U. Cincinnati L. Rev. 525, 545 (1975). The difficulty with the position advanced here is that it elevates an institution's purely administrative interests—divorced from the need to protect academic freedom, and divorced from any demonstrable relationship to educational affairs—into a special category of First Amendment rights. There is no justification for a constitutional doctrine so indiscriminate in its sweep and pernicious in effect.

CONCLUSION

Amicus AAUP is generally in accord with Princeton University on the need for institutional autonomy in educational affairs and on the constitutional protection that may properly be claimed in support of institutional autonomy. Nor is *amicus* AAUP unsympathetic to the depth of sentiment that has persuaded the administration of one of the Nation's outstanding universities to press the theory of autonomy in the instant case. But upon the precise question presented, and for the reasons expressed in this brief, *amicus curiae* respectfully urges that the judgment of the New Jersey Supreme Court be affirmed.

Respectfully submitted,

MATTHEW W. FINKIN
School of Law
Southern Methodist University
Dallas, Texas 75275
Attorney for Amicus Curiae

Of Counsel:

JULIUS G. GETMAN
Law School
Yale University
New Haven, Connecticut 06520

WILLIAM VAN ALSTYNE
School of Law
Duke University
Durham, North Carolina 27706

WALTER P. METZGER
Department of History
Columbia University
New York, New York 10027

THOMAS M. SCANLON, JR.
Department of Philosophy
Princeton University
Princeton, New Jersey 08544

Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY, *Appellants,*

v.

CHRIS SCHMID, *Appellee.*

On Appeal From The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES AMICI CURIAE IN SUPPORT OF APPELLANTS

R. CLAIRE GUTHRIE*
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle, N.W.
Washington, DC 20036
(202) 833-4741

CHRISTINE TOPPING MILLIKEN
NIICU
1717 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 387-7623

Attorneys for Amici
*Counsel of Record

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE FEDERAL CONSTITUTION DOES NOT REQUIRE PRIVATE COLLEGES AND UNIVERSITIES TO OPEN THEIR CAMPUSES TO THE EXPRESSIVE ACTIVITIES OF STRANGERS 5

II. THE FEDERAL CONSTITUTION PROHIBITS THE STATES FROM COMPELLING PRIVATE COLLEGES AND UNIVERSITIES TO DEDICATE USE OF THEIR PROPERTY TO THE EXPRESSIVE ACTIVITIES OF STRANGERS 8

III. THE INDEPENDENCE OF PRIVATE COLLEGES FROM UNWARRANTED AND UNCONSTITUTIONAL GOVERNMENTAL INTRUSION IS ESSENTIAL TO MAINTAINING THE VITALITY OF AMERICA'S SYSTEM OF POST-SECONDARY EDUCATION AND THE CONTRIBUTION OF COLLEGES AND UNIVERSITIES TO THE SYSTEM OF FREEDOM OF EXPRESSION THAT THE FIRST AMENDMENT PROTECTS 14

CONCLUSION 20

TABLE OF AUTHORITIES

CASES:

CBS, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 5, 10

Evans v. *Newton*, 382 U.S. 296 (1966) 7

Goldberg v. *Regents of the University of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967) ... 9

Table of Authorities (continued)

Page

Greenya v. *George Washington University*, 512 F.2d 556 (D.C. Cir. 1975) 7

Healey v. *James*, 408 U.S. 169 (1972) 12, 13

Hudgens v. *NLRB*, 424 U.S. 507 (1976) 6, 8

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) 6

Marsh v. *Alabama*, 326 U.S. 501 (1946) 6

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 9, 10

Otis v. *Parker*, 187 U.S. 606 (1903) 18

PruneYard Shopping Center v. *Robins*, 447 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980) 8, 9

Robins v. *PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) 8

State of New Jersey v. *Schmid*, 84 N.J. 535, 423 A.2d 615 (1980) ..... *passim*

Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) .. 10, 11, 19

Tinker v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) 13

University of California Regents v. *Bakke*, 438 U.S. (1978) 10

CONSTITUTIONS AND STATUTES:

U.S. Const., First Amendment ..... *passim*

OTHER AUTHORITIES:

T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) 15

C.R. PACE, THE DEMISE OF DIVERSITY? A COMPARATIVE PROFILE OF EIGHT TYPES OF INSTITUTIONS (1974).. 16, 17

Gottleib, *Government Allocation of First Amendment Resources*, 41 U. PITT. L. REV. 205 (1980) 16

Table of Authorities Continued

Page

Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975). 16

Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979) 19

Note, *Developments in the Law-Academic Freedom*, 81 HARV. L. REV. 1045 (1968) 18

Note, *Private Universities: The Right to be Different*, 11 TULSA L. J. 58 (1975) 15

Student Rights in Private Universities: The Impact of Federal Aid to Higher Education, Address by Jose Cabranes, then General Counsel of Yale University, Federal Bar Association Second Annual Conference on Student Rights, Arlington, Virginia (March 22, 1976) 19

No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY, *Appellants,*

v.

CHRIS SCHMID, *Appellee.*

On Appeal From The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICI

The American Council on Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) are nonprofit corporations organized under the laws of, and located in, the District of Columbia. Founded in 1918, ACE is a voluntary membership organization composed of 1,401 non-profit institutions of higher education from both the public and private sectors and 178 educational associations

and organizations. NIICU's membership consists of approximately 850 independent, non-profit colleges, universities and educational associations.

ACE is the nation's major coordinating body in postsecondary education. NIICU's mission is to provide a unified national voice for independent higher education in the shaping of public policy. As organizations whose members include the overwhelming majority of four-year colleges and universities, ACE and NIICU are uniquely able to represent the interests of higher education generally on matters of national importance, including the case pending before this Court.

All of the colleges and universities that are members of ACE and NIICU have a substantial interest in the outcome of this case. Nineteen of ACE's and/or NIICU's members are independent, non-profit colleges and universities, located in New Jersey. In addition to Princeton University, included in ACE's and/or NIICU's membership are: Beth Medrash Gohova, Bloomfield College, Caldwell College, Centenary College, College of Saint Elizabeth, Drew University, Fairleigh Dickinson University, Felician College, Georgian Court College, Monmouth College, New Brunswick Theological Seminary, Northeastern Bible College, Rider College, Saint Peter's College, Seton Hall University, Stevens Institute of Technology, Union College, Upsala College and Westminster Choir College. All of these institutions will be affected directly by the Court's answer to the question presented for review:

> Whether a private university has the right under the First, Fifth and Fourteneth Amndments to determine without state interference what expres-

sive activities by strangers it will permit on its campus and under what circumstances.

The decision of the New Jersey Supreme Court subjects each of these colleges to governmental scrutiny and regulation of expressive activities that are protected from infringement by the United States Constitution.

The many other independent colleges and universities not located in New Jersey that are members of ACE and NIICU also have a substantial stake in the outcome of the Court's review of this case. The Court's judgment regarding the proper balance to be struck between the first amendment right of colleges and universities to determine and pursue educational objectives and the police power of the states can have nationwide consequences.

Finally, the public colleges and universities that are members of ACE have a significant interest in the answer to the question presented by appellants. For purposes of interpreting the scope of an individual's first amendment rights, the courts have long recognized valid and important distinctions between the grounds and buildings of government operated colleges and universities, and public streets and parks. A decision that fails to recognize the expressive nature of the education enterprise and to take that into account in balancing constitutionally protected interests could lead to erosion of other Supreme Court doctrines that properly limit governmental intrusion on academic freedom and insure the ability of all colleges and universities to regulate the use of their facilities in a manner consistent with maintaining an environment conducive to teaching and learning.

SUMMARY OF THE ARGUMENT

In *Princeton University and State of New Jersey* v. *Schmid*, the New Jersey Supreme Court interpreted the New Jersey Constitution as conferring on strangers to the campus of a private university an affirmative right to engage in expressive activities on the college's private property. This interpretation of New Jersey law presents a substantial question of federal constitutional law.

The Appellee in this case, Chris Schmid, has no federal first amendment right to distribute literature on the campus of Princeton University—a private chartered institution of higher education in the State of New Jersey. The first amendment does not regulate the actions of private parties but only prohibits governmental abridgement of free speech. The only "right" of access to Princeton's private property which the Appellee has is a right under state law which was conferred on him by the New Jersey Supreme Court's interpretation of the New Jersey State Constitution.

On the other hand, Princeton University, which together with the State of New Jersey seeks review of the decision below, does have federal first amendment rights which are at issue in this case. These rights are infringed by the New Jersey Supreme Court's ruling that Mr. Schmid is entitled to free access to Princeton's private property subject only to such regulations of time, manner and place that the New Jersey Court says are reasonable given its understanding of Princeton's educational objectives.

Four freedoms which are essential to any university are guaranteed to Princeton by the first amendment: "to determine for itself on academic grounds who may

teach, what may be taught, how it shall be taught, and who may be admitted to study." The New Jersey Supreme Court's interpretation of the State Constitution intrudes on Princeton's exercise of these rights by substituting the State Court's analysis of Princeton's educational mission, and its judgment of what uses of Princeton's property are consistent with that mission, for Princeton's own constitutionally protected determinations regarding these issues. This action by the New Jersey Supreme Court is precisely the sort of governmental abridgement of free speech against which the first amendment was designed to protect.

Princeton University's federally protected first amendment rights are paramount to any interest in expressional activities conferred on Mr. Schmid by the State of New Jersey. Because it fails to recognize the existence and supremacy of Princeton's important first amendment freedoms and the national interest which they serve, the decision of the New Jersey Supreme Court contravenes the federal constitution and it must be reversed.

ARGUMENT

I.

The Federal Constitution Does Not Require Private Colleges and Universities To Open Their Campuses To The Expressive Activities Of Strangers.

It has long been settled that the guarantee of free speech in the first amendment to the United States Constitution:

> is a guarantee only against abridgment by the government. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). Thus, while statutory or common law may in some situations extend protection or pro-

> vide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself. *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976)

Therefore, unless there is some reason to conclude that action by a private university such as Princeton is governmental action, a stranger to a private college campus like Mr. Schmid has no federally protected right to distribute literature on the institution's private property, and the institution is not required to permit him to engage in such activities.

The Supreme Court held in *Hudgens* that, in a case such as this one, the appropriate standard for determining whether a private property owner's action can be construed as governmental action subject to constitutional restraints is the test first applied by the Court in *Marsh* v. *Alabama*, 326 U.S. 501 (1946). The *Marsh* standard is a qualitative rather than a quantitative one. Thus, the mere size or physical character of a private college's property holdings is not determinative. Similarly, the fact that some services the college provides are like some services some municipalities provide is not dispositive.

For *Marsh* to apply, the private university must be "performing the full spectrum of municipal powers and stand in the shoes of the State." *Hudgens* v. *NLRB*, 424 U.S. at 519. The mere fact that the private institution is engaged in the "business" of education, a business "affected with a public interest" and regulated by the federal government and the states, is not sufficient to transform its private actions into state actions. *Jackson* v. *Metropoliton Edison Co.*, 419 U.S. 345, 354 (1974). Nor is the fact that the state also is

engaged in the business of education sufficient to make all education a "public function" subject to constitutional restraints.

> The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems. *Evans* v. *Newton,* 382 U.S. 296, 300 (1966).[1]

There is no question in this case that Princeton University does not have all of the attributes nor perform all of the functions of a municipality. *State of New Jersey* v. *Chris Schmid and Stephen Komm,* No. SC53264 (Borough of Princeton Mun. Ct. October 30, 1978), Appellants' Jurisdictional Statement at 65A. Therefore, Princeton's decision to limit strangers' access to its campus is not "state action" limited by the federal constitution. Since the constitution makes no attempt to order the relationship of two private parties, whatever claim Mr. Schmid has to access to Princeton's campus, it is not a federal one.

---

[1] *See also, Greenya* v. *George Washington University,* 512 F.2d 556, 561 n.10 (D.C. Cir. 1975):

> [W]e have considered whether higher education constitutes "state action" because it is a "public function" as that term has been developed since *Marsh* v. *Alabama,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), and have concluded that it is not. We agree with the Second Circuit's conclusion that education, even at the primary or secondary levels, has never been a state monopoly in the United States. As a historical matter, the wide-scale private development of higher education in this country preceded state entry into the field by more than a century. [Citations omitted.]

II.

The Federal Constitution Prohibits The States From Compelling Private Colleges and Universities To Dedicate Use of Their Property To The Expressive Activities Of Strangers.

As noted above, in *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976), the Supreme Court laid to rest the notion that the federal constitutional guarantee of free speech has a part to play in ordering the relationship of two private parties:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state. 424 U.S. at 513.

At the same time, the Court held open the possibility that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others . . . ." *Id.*

In *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), the Court confronted its first example after *Hudgens* of state law designed or interpreted to provide additional protection to expressive activities. The Court upheld a decision of the California Supreme Court, *Robins* v. *PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), that the California Constitution protects the reasonable exercise of free speech in private shopping centers. However, in affirming the lower court decision, the Supreme Court made clear that the exercise of the state police power to protect free speech activities on private property is not without limits, and it is the limits identified in *PruneYard* that require reversal of the New Jersey Supreme Court's decision in this case.

In *PruneYard* the Supreme Court held:

> It is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property *so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision* (emphasis added). 447 U.S. at 81.

The Court rejected the arguments of the shopping center owners in *PruneYard* that the California court's interpretation of the state constitution resulted in a prohibited taking or infringed any other federally guaranteed constitutional right of the owners. Specifically, the Supreme Court concluded there was no infringement of the shopping center owner's first amendment rights. 447 U.S. at 88.

The *PruneYard* case is easily distinguished from *Princeton University* v. *Schmid,* the case now before the Court. Unlike shopping centers which are business establishments with no expressive mission, universities and colleges have as their primary purpose the expressive activities of teaching and research.[2] These purposes are analogous to the functions of newspaper editors that the Court held worthy of protection from even benign state intrusion in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), and their entitlement to first amendment protection distinguishes *Schmid* from *PruneYard* and requires a different result.

---

[2] The function of a university is "to impart learning and to advance the boundaries of knowledge." *Goldberg* v. *The Regents of the University of California,* 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

In *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978), the Supreme Court recognized that the freedom of universities to conduct their "business" is "a special concern of the First Amendment." 438 U.S. at 312. Quoting from Justice Frankfurter's concurring opinion in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), the Court in *Bakke* affirmed that there are four "freedoms" essential to a university: "to determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study." 438 U.S. at 312. Encompassed within these four freedoms is the right to control free from government intrusion access to the forum which a university and its campus represents.

In *Miami* v. *Tornillo, supra, citing CBS, Inc.* v. *Democratic Nat'l C'ee*, 412 U.S. 94, 117 (1973), the Court recognized only two controls on the power of the privately owned press to determine and advance its political, social and economic views—the sufficiency of its readers, and the journalistic interests of its editors. Recognizing that neither of these controls might be sufficient to guarantee that the private press would be "responsible" in its selection of news items and fair in its presentation of varying points of view, the Court nonetheless invalidated a Florida statute that sought to guarantee a range of parties access to the media for the purpose of insuring free and fair elections by ensuring an informed electorate.

> A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. 418 U.S. at 256.

Similarly, the number of students wishing to attend an institution and the number of other parties wishing to contribute to its financial well being together with the educational interests of its faculty, students and administration are the only controls that should operate to circumscribe the four essential freedoms of a private university.

Justice Frankfurter, concurring in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261-62 (1975), described best the attitude the courts should have in approaching questions about the governmental intrusion in the intellectual life of universities:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealings, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. *Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling* (emphasis added).

To determine in this case whether there exist compelling interests sufficient to justify the state's intru-

sion on Princeton's academic freedom, it is helpful first to understand what is *not* at issue here. This case does not present a conflict among members of "the community of scholars" or a situation in which either teachers or students are circumscribed by the administration in their exercise of academic freedom. This case presents the question *who* should decide what rule the "community of scholars" should observe regarding access by persons who are not members of the University community to the scholars' "marketplace of ideas."

In this case the record shows that the solicitation rule challenged by Mr. Schmid and held unconstitutional under the New Jersey Constitution was adopted not by the University administration acting unilaterally but by the Council of the Princeton University Community—a body composed of students, faculty, staff, alumni and administrators. Appellants' Jurisdictional Statement at 2a. The record further shows that the challenged rule governing access was amended by the same representative body in 1979 after Mr. Schmid's trespass arrest and conviction. Appellants' Jurisdictional Statement at 2a. Thus, it is the entire University community's policy decision that is adversely affected here not the errant whim of an administrator or the contested edict of a governing board.

The process by which Princeton's solicitation rule evolved and was amended is precisely the sort of educational experience one would hope this country's universities are providing their students. As Chief Justice Burger said in his concurring opinion in *Healy* v. *James*, 408 U.S. 169 (1972) (Burger, C.J. concurring),

> (P)art of the educational experience of every college student should be an experience in re-

> sponsible self-government and this must be a joint enterprise of students and faculty. *It should not be imposed unilaterally from above* . . . (emphasis added).

The courts should be the "last resort" in matters this central to the educational process. *Id.* When as in this case the policy judgment being reviewed represents a concensus reached through a lively and wide ranging internal debate, the courts should not choose lightly to substitute judicial edict for this exemplary educational experience.

The New Jersey Supreme Court cited the special nature and needs of the educational enterprise in its decision below:

> Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. *See, e.g., Healy* v. *James, supra,* 408 U.S. at 180, 92 S.Ct. at 2345, 33 L. Ed. 2d at 279; *Tinker* v. *Des Moines Indep. Community School Dist.,* 393 U.S. 503, 513-514, 89 S.Ct. 733, 740-741, 21 L. Ed. 2d 731, 741-742 (1969). Appellants' Jurisdictional Statement at 31a.

Yet, the court failed to recognize that the educational policy judgment made by the Council of the Princeton University Community is accorded protection from

state intrusion by the first amendment, and it did not develop "obviously compelling" reasons for the intrusion on the first amendment interests of the "community of scholars" resulting from the court's decision to compel specific "educational" uses of Princeton's property.

Rather than subject to strict scrutiny *its governmental action* limiting Princeton's freedom under the first amendment to decide how its property will be used to support its educational objectives, the New Jersey Supreme Court subjected Princeton's action—the action of a private "person"—to a content conscious, subjective test of reasonableness. The court tested Princeton's access rule against *the court's* understanding of Princeton's educational mission and concluded "a public presence within Princeton University is entirely consonant with the University's expressed educational mission." *State* v. *Schmid,* Appellants' Jurisdictional Statement at 29A. It is precisely this judgement which the federal constitution reserves to private universities such as Princeton. And, it is because the action of the New Jersey Supreme Court substitutes the state's judgment for Princeton's on this issue that the decision below must be reversed.

III.

The Independence Of Private Colleges From Unwarranted And Unconstitutional Governmental Intrusion Is Essential To Maintaining The Vitality Of America's System Of Post-Secondary Education And Its Contribution To The System Of Freedom Of Expression That The First Amendment Protects.

As one reads the New Jersey Supreme Court's opinion in this case, one cannot help but note the court's obvious underlying conviction that in *its* view the solic-

itation rule enforced by Princeton was in conflict with the court's notion of the proper way to administer a "market place of ideas." It may be that Princeton's rule was illogical or unwise but that is not the province of the court to decide absent compelling constitutional reasons. Indeed, it is the right to be distinctive that is the essential characteristic of an independent college or university which is protected by the first amendment. Contrary to the New Jersey Supreme Court's view that it was enhancing opportunities for open discussion by requiring Princeton to dedicate the use of its private campus to the expressive activities of strangers, the court's action was a push toward conformity among public and private colleges that strikes at the heart of "the system of freedom of expression" [3] protected by the first amendment.

As Judge Friendly noted, the value of the freedom guaranteed to private colleges "is the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly abritrary ones—without having to provide a justification that will be examined in a court of law. . . ." [4] Without such a possibility for private institutions to act in ways different from the government, the "system of freedom of expression" protected by the first amendment would not exist. There would only be thoughts established by the gov-

---

[3] *See generally* T. Emerson, The System of Freedom of Expression, Ch. I (1970).

[4] H. Friendly, The Dartmouth College Case and The Public-Private Penumbra quoted in Note, *Private Universities: The Right to be Different*, 11 Tulsa L. J. 58, 59 (1975).

ernment.[5] The first amendment protests against the establishment by the government of a particular ideology and insures the right of freely exercised dissent by private parties in much the same way as it protects against the establishment of religion and guarantees its free exercise.[6]

Together with tenure, diversity among America's educational institutions is an essential guarantor of the ideological diversity which the first amendment was written to protect and which is the foundation of our democratic government.[7] Diversity among colleges and universities does more than enlarge the range of educational products from which student consumers may choose. Evidence indicates that differences in the educational environments presented by different kinds of institutions (*e.g.*, highly selective and comprehensive universities, strongly denominational liberal arts colleges and colleges emphasizing engineering and science) result in differences in the progress and performance of their students and alumni. *See* C. R. PACE, THE DEMISE OF DIVERSITY? A COMPARATIVE PROFILE OF EIGHT TYPES OF INSTITUTIONS (1974) (hereinafter PACE). Enrollment changes since 1950 have tended to favor the large state universities and, consequently, the contribution and national impact of the distinctiveness of general liberal arts colleges has been reduced. PACE at 130.

---

[5] Gottlieb, *Government Allocation of First Amendment Resources*, 41 U. PITT. L. REV. 205, 249 (1980) (the first amendment prohibits government establishment of thoughts).

[6] *See generally*, Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975).

[7] *See generally* Gottlieb, *supra* note 5 at 231-32.

These trends have led the authors of a technical report sponsored by the Carnegie Commission on Higher Education to observe

> we think it should be of some concern to those who shape public policy to note that the most distinctive institutions (for the most part private selective institutions) which means to some extent the institutions that are most effective in achieving their purposes, are also the ones that enroll the fewest students, are in the most serious financial condition today, and whose long range future is least assured . . . Further drift toward a least common denominator—whether in public tax policies, *educational conformity*, or private philanthropy—may further reduce the pockets of excellence and distinction in higher education that still remain (emphasis added). PACE at 131.

The New Jersey Supreme Court's opinion in this case acknowledges at several points the historical and judicial distinctions between private and public colleges. *See, e.g., State of New Jersey* v. *Schmid*, 84 N. J. 535, 423 A.2d 615 (1980), Appellants' Jurisdictional Statement at 9a and 31a. However, the net effect of the court's decision is to diminish these important distinctions resulting in further erosion of the pluralism and diversity of educational opportunities which are the hallmark of American higher education. This is exactly the sort of push toward educational conformity the Carnegie Commission report decries.

Judicial supervision and direction of private university decision-making regarding expressive activities on campus can only "undermine the integrity of private educational institutions, and, with it, the ability of these schools both to experiment and innovate in educational matters, and to satisfy a wide variety of

individual wants." Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1055 (1968). "The interests of autonomy in private education call for judicial abstention (in this case)." *Id.*

The comments of Chief Justice Holmes for the majority in *Otis* v. *Parker*, 187 U.S. 606, 608-9 (1903), are apposite here:

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*

The role of the independent college as nurturer and/or protector of the various distinctive strands of our nation's culture has been overlooked and damaged by the New Jersey Supreme Court's opinion. To foster the intellectual, moral and sometimes the religious development of its students lies at the heart of the academic mission of many of these colleges. In this respect a private college is more akin to a church than a shopping center. Its property rights are given meaning and substance by its ability to create an atmosphere conducive to its definition of a productive voluntary association. The greatest threat to free speech does not come from allowing each of these private

colleges to determine the content of its educational message and to dedicate the use of its private property exclusively to its own efforts to communicate that message.[8] The greatest threat to free speech comes from permitting the government to regulate these private expressive activities even when the purpose is the laudable one of ensuring all voices are heard in a particular private forum.

> These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means exclusion of governmental intervention in the intellectual life of a university. *Sweezy* v. *New Hampshire*, 354 U.S. at 262 (Frankfurter, J., concurring).

Over a century ago, Benjamin Disraeli argued in the House of Commons against a proposal to establish a central system of government administration for Oxford University. He stated, "If I were asked, 'would you have Oxford with its self government, freedom, and independence, but yet with its anomalies and imperfections, or would you have the university free of those anomalies and imperfections and under the control of government?' I would say 'give me Oxford, free and independent, with all of its anomalies and imperfections.' "[9] Similarly, *amici* prefer a system of

---

[8] Yudof, *When Governments Speak: Toward A Theory of Government Expression And The First Amendment*, 57 TEXAS L. REV. 863, 873 (1979).

[9] Quoted in Student Rights in Private Universities: The Impact of Federal Aid to Higher Education, Address by Jose Cabranes, then General Counsel of Yale University, Federal Bar Association Second Annual Conference on Student Rights, Arlington, Virginia (March 22, 1976).

higher education in America that includes private universities free to make mistakes as well as to excell over one in which all institutions, for better or for worse, conform to a single government ideology.

CONCLUSION

For each of the reasons set forth above, the Court should reverse the decision of the court below.

Respectfully submitted,

R. CLAIRE GUTHRIE*
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle, N.W.
Washington, DC 20036
(202) 833-4741

CHRISTINE TOPPING MILLIKEN
NIICU
1717 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 387-7623

Attorneys for Amici

*Counsel of Record

Office-Supreme Court, U.S.
FILED
JUL 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1576

IN THE

Supreme Court of the United States

October Term, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,
Appellants,

—against—

CHRIS SCHMID,
Appellee.

On Appeal From the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES IN NEW JERSEY

MICHAEL F. SPICER *
JAMIESON, MCCARDELL, MOORE,
PESKIN & SPICER
194 Nassau Street
Princeton, N. J. 08540
Attorneys for Amicus Curiae

* Counsel of Record

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INTEREST OF THE AMICUS

The Association of Independent Colleges and Universities in New Jersey submits this brief as *amicus curiae* with the consent of all the parties.

The Association previously submitted a brief herein to support the jurisdictional statement filed by Princeton University. It has 16 members, which, as the name of the Association indicates, are all private, higher educational institutions located in the State of New Jersey, as follows:

Name	*Location*	*Approximate Number of Students*
Bloomfield College	Bloomfield	2,100
Caldwell College	Caldwell	720
Centenary College	Hackettstown	950
College of Saint Elizabeth	Convent Station	850
Drew University	Madison (Morris County)	2,525
Fairleigh Dickenson University	Rutherford & other locations	20,125
Felician College	Lodi	765
Georgian Court College	Lakewood	1,385
Monmouth College	Long Branch	3,825
Princeton University	Princeton	6,165
Rider College	Lawrenceville	5,730
Saint Peter's University	Jersey City	4,090
Seton Hall University	So. Orange & Newark	10,225
Stevens Institute of Technology	Hoboken	2,830
Upsala College	East Orange	1,725
Westminster Choir College	Princeton	440

The ruling below of the New Jersey Supreme Court directly affects every member of the Association.

ARGUMENT

The Association supports the position of Princeton University as stated in its brief.

Its members take this position because they believe that they are each different from the other and that they are all different from the public institutions. They believe this diversity is of itself an integral and crucial part of the educational system of this society. They believe that the decision of the New Jersey Superior Court can only tend to make them less diverse and more like each other. This is because the courts will be the ultimate authority of their policies and purposes when it comes to deciding what may be expressed by whom on their property. To permit this reduction in diversity is in contradiction to the constitutional rights of the educational institutions of New Jersey, as is indicated by the cases and argument set forth in the brief of Princeton University.

Respectfully submitted,

MICHAEL F. SPICER,
JAMIESON, MCCARDELL, MOORE,
PESKIN & SPICER,
Attorneys for Amicus Curiae.

MOTION FILED
JUL 14 1981

No. 80-1576.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY,
APPELLANTS,

v.

CHRIS SCHMID,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

Motion of Massachusetts Institute of Technology for Leave to File Brief Amicus Curiae and Brief of Amicus Curiae Massachusetts Institute of Technology in Support of Appellants.

JAMES ROOSEVELT, JR.,
Counsel of Record,
KAY H. HODGE,
HERRICK & SMITH,
100 Federal Street,
Boston, Massachusetts 02110.
(617) 357-9000
Attorneys for Amicus Curiae Massachusetts Institute of Technology

July 13, 1981.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

No. 80-1576.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY,
APPELLANTS,

v.

CHRIS SCHMID,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

Motion of Massachusetts Institute of Technology for Leave to File Brief Amicus Curiae.

Pursuant to Rule 36 of the Rules of this Court, the Massachusetts Institute of Technology ("M.I.T.") respectfully moves the Court for leave to file a brief amicus curiae in the above-entitled case. Counsel for appellee Chris Schmid has given oral consent, but written consent has not been received. Upon

receipt of written consent, it will be filed with the Clerk of this Court. The appellants Princeton University and the State of New Jersey have granted their consent and copies of these consents are filed with this motion and brief.

M.I.T., like Princeton, is a private, non-profit university. The question of whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances may have a significant impact on the rights of all private universities. Moreover, M.I.T. in its brief focuses the Court's attention upon the property rights of a private university to make essential academic policy decisions regarding the access and use of its campus. M.I.T. is concerned that this Court should be aware of the important ramifications of this issue.

Conclusion.

For these reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying amicus brief in the present case in support of the position of the appellants.

Respectfully submitted,

JAMES ROOSEVELT, JR.,
Counsel of Record,
KAY H. HODGE,
HERRICK & SMITH,
100 Federal Street,
Boston, Massachusetts 02110.
(617) 357-9000
Attorneys for Amicus Curiae Massachusetts Institute of Technology

No. 80-1576.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY,
APPELLANTS,

v.

CHRIS SCHMID,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

Brief of Amicus Curiae Massachusetts Institute of Technology in Support of Appellants.

Table of Contents.

Interests of amicus curiae 1

Summary of argument 3

Argument 4

The right of a private university to the use and control of its campus is unconstitutionally abridged when a state requires that the campus be used as a forum for the expressive activities of strangers 4

A. The decision of a private university to limit or prohibit expressive activities by strangers on its property serves essential academic objectives 4

B. Because of the academic use and value of a university's property, it has the "right to exclude others" 9

Conclusion 14

Appendix follows page 14

Table of Authorities Cited.

Cases.

Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) 11n

Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) 11

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 9

Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972) 11

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) 11, 12n

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 9, 10, 12

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 7

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 10

University of California Regents v. Bakke, 438 U.S. 265 (1978) 11n

CONSTITUTIONS AND STATUTES.

U.S. Constitution

First Amendment 2, 9

Fifth Amendment 2, 9

Fourteenth Amendment 2, 9

RULES.

United States Supreme Court Rule 36 1n

OTHER AUTHORITIES.

M.I.T. Policies and Procedures (September 1979) 1, 4n

L. Wilson, Campus Freedom and Order, 45 Denv. L.J. 502 (1968) 8

Interests of Amicus Curiae.[1]

The Massachusetts Institute of Technology ("M.I.T.") is a private non-profit university. It is an urban institution with a main campus located in Cambridge, Massachusetts and a research facility, Lincoln Laboratory, located in Lexington, Massachusetts.[2]

> In carrying out the provisions of its charter, [M.I.T.] has focused on two objectives, one primary and the other secondary: the advancement of knowledge through education and research, both pure and applied, in science, engineering, architecture and planning, management, social sciences, and the humanities; and service to the community and nation through the use of [M.I.T.'s] resources, both intellectual and material.

M.I.T. Policies and Procedures at 2 (September 1979). To achieve these objectives, M.I.T. provides an environment in which there are a number of opportunities for the orderly and responsible presentation of issues and points of view both inside and outside the classroom.

As an urban university, integrated by location and geography into Cambridge, M.I.T. cannot avoid some public presence on its campus. Hence, M.I.T., like Princeton University, has a substantial interest in maintaining control of the activities of strangers on its campus where they have the potential to con-

---

[1] Counsel for the parties have consented to the filing of this brief. The written consents of the appellants have been filed with the Clerk of the Court pursuant to Rule 36 of the Rules of this Court. Inasmuch as written consent from the appellee has not been received, M.I.T. has filed a motion for leave to file amicus brief, as set forth *supra*.

[2] A map of the main campus is set forth in the Appendix to this brief.

flict or interfere with its objectives. To this end, it has a policy which prohibits strangers from engaging in any distribution or solicitation activities while on the campus. This policy has been consistently enforced for many years against all strangers regardless of the content of the message or the worthiness of the cause.

M.I.T. has a right to control its private property, the campus, and to prohibit the use of its property for the expressive activities of strangers. M.I.T. believes this right is protected by the U.S. Constitution. However, the decision of the Supreme Court of New Jersey has placed this right in jeopardy.

Because of the importance of this issue, not only to Princeton, but to all private universities, and for the reasons which follow, M.I.T. submits this *amicus* brief:

1) Although M.I.T. is located in Massachusetts, not New Jersey, the decision of this Court may influence other state courts in the interpretation of their state constitutions.

2) As an academic institution, M.I.T. seeks clear guidance from this Court on the permissible scope and standard of review in this case which raises issues of state judicial interference with legitimate academic interests which are protected by the First, Fifth and Fourteenth Amendments of the U.S. Constitution.

3) M.I.T. supports the positions articulated by Princeton University in its brief. However, M.I.T. believes that, in addition to First Amendment rights, universities have substantial property interests which may not constitutionally be abridged.

M.I.T. hopes that its perspective will be of assistance to the Court in treating this fundamental and serious question.

Summary of Argument.

The decision of the Supreme Court of New Jersey, restricting Princeton University's right to regulate the expressive activities of strangers on its campus, represents an unwarranted judicial intrusion into the field of educational policy-making. As such, the decision strikes at one of the most substantial element in the bundle of rights held by a private university in its campus property. A clear purpose for which property is held by a university is to foster an environment which, in the judgment of university administrators, is most conducive to a meaningful learning experience. A crucial element in maintaining that environment lies in the ability of the university to regulate access to it and to limit participation in it to those whom it selects. In addition, a significant part of the attraction of a university to potential students and faculty members lies in the educational environment and in the continuing ability of the university to structure and maintain that environment. The "right to exclude others" where they threaten to interfere with the educational purposes of the university thus constitutes an essential component of the value or utility of the university's private property.

Ordinarily, state intrusion on such an essential aspect of a private party's property rights constitutes a "taking." It is recognized, however, that in the face of a compelling countervailing interest, private property rights may be compromised. The Supreme Court of New Jersey held that appellee Schmid, and others like him, have just such a compelling countervailing interest in expressing their views to members of the Princeton community. In so doing, however, they failed to accord adequate importance to the existence of available alternative channels for the effectuation of Schmid's expression. If Schmid's interest in communicating his ideas to members of

the Princeton community may be accommodated without requiring that he be allowed to interfere with the educational environment developed and maintained by Princeton, then judicial intrusion into the right of the university to regulate the conduct of strangers within its campus boundaries is unjustified.

The right to make decisions concerning basic educational policy goes to the essence of the value of a university's property. State abridgement of that right in the name of free speech may not be justified where there exist alternative channels of communication. The action of the Supreme Court of New Jersey constituted a "taking" of a vital property interest of Princeton University without just compensation and must be reversed.

Argument.

THE RIGHT OF A PRIVATE UNIVERSITY TO THE USE AND CONTROL OF ITS CAMPUS IS UNCONSTITUTIONALLY ABRIDGED WHEN A STATE REQUIRES THAT THE CAMPUS BE USED AS A FORUM FOR THE EXPRESSIVE ACTIVITIES OF STRANGERS.

A. *The Decision of a Private University to Limit or Prohibit Expressive Activities by Strangers on its Property Serves Essential Academic Objectives.*

The objectives of M.I.T. are to educate students, to engage in research and scholarship, and to provide service to the community.[3] To further these objectives, M.I.T. has made certain

---

[3] The basic goals of most universities are similar. Thus, the following description of M.I.T.'s objectives, contained in *Policies and Procedures* at 2-3 (1979), is offered as an example.

"*Education*: It is the purpose of the educational program to develop in each student that mastery of fundamentals, versatility of mind, motivation

fundamental academic policy judgments. Although one of its objectives is to educate, M.I.T. has limited the size of its student body and the number of its classes. Likewise, although another objective is to advance research and scholarship, M.I.T. does not provide instruction or opportunities for research in all areas of intellectual inquiry. Finally, although a third objective is service to the community, M.I.T. has committed its resources and property for the use primarily of its community of scholars. In a manner that M.I.T. deems to be consistent with its objectives, it accords to the public only limited rights of access and use of its campus. The public may be invited to attend specific events such as concerts or lectures, but M.I.T. extends no open-ended invitation to the public to come onto the campus or to use M.I.T. facilities at will.[4]

Because the openness of the campus makes it virtually impossible to exclude strangers from university grounds,[5] M.I.T.

---

for learning, and best foundation for continuing professional achievement . . . to provide a liberal as well as professional education so that each student acquires a respect for moral values, a sense of the duties of citizenship, a feeling for taste and style, and the basic human understanding and knowledge required for leadership . . . and thereby to send forth men and women of the highest professional competence, with the breadth of learning and of character to deal constructively with the issues and opportunities of our time.

Research and Scholarship: The Institute seeks through research and reflection to extend the boundaries of knowledge and the horizons of the human intellect. In so doing, it aims to create an atmosphere of intellectual excitement, a climate of inquiry and innovation in which each student develops a consuming interest in understanding for its own sake.

Service: As a modern university and social institution, M.I.T. recognizes an inherent obligation to serve its students and alumni, the professions, the world of scholarship, and society. As part of this obligation, the Institute seeks to serve the community and nation directly through its faculty and through the use of its facilities and administrative resources whenever there is a compelling need to which it can respond without impairing its primary functions."

[4] On occasion, however, M.I.T. has held an open-house to which the general public has been invited.

[5] The campus is bisected by a major access road between Boston and Cambridge — Massachusetts Avenue. *See* Map at Appendix. Massachusetts

has had to establish certain rules regulating that public presence. Unlike Princeton, M.I.T. does not permit strangers to engage in any distribution or solicitation activities on its campus. This prohibition is an absolute one, extending to all such activities, regardless of the content of the message or the worthiness of the cause. Furthermore, M.I.T. has applied this rule consistently for many years.

M.I.T. recognizes the value of exposure to a public marketplace of ideas in which all views are expressed. For a variety of reasons, however, it does not believe that such a marketplace is the appropriate campus environment for the learning and research experiences of its community.

First, M.I.T. seeks to provide its students and faculty with the greatest possible opportunity to engage in expressive activities in an atmosphere which facilitates the orderly, rational and responsible presentation of viewpoints on a broad range of issues. The achievement of this aim requires that the limited areas of the campus suitable for expressive activities be available to the M.I.T. community without competition from a potentially large number of strangers.

The effectiveness of advocacy in any forum depends in part on the number of voices competing for attention. As this Court has said in another context, a communication medium is of little use where a "cacaphony [sic] of competing voices" exists since none of them can be "clearly and predictably heard."

Avenue is used by the walking and riding public continually throughout the day. Along the entire length of the campus overlooking the Charles River is Memorial Drive, another major thoroughfare with sidewalks for foot traffic. From east to west the campus is divided by both Vassar and Albany Streets. The part of the campus west of Massachusetts Avenue is divided by Amherst Street running east and west and by Audrey, Endicott and Danforth Streets which generally run north and south. East of Massachusetts Avenue, the campus is bordered by Main Street with Ames, Carleton and Wadsworth Streets running generally north and south and Amherst Street running east and west.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 376 (1969). In the forum subject to its control, M.I.T. has decided to favor the expressive interests of its community over those of strangers.

Moreover, this decision does not limit the range of views expressed on the campus or the vitality of the debate. The 8,865 students, the 950 faculty members, and the 6,205 staff members at M.I.T. are sufficiently diverse in background, interests, and experience that a wide range of views is articulated.[6]

Second, the policy restricting the expressive activities of strangers may lessen the potential for disruption, harassment, and fraudulent solicitations on campus. Accordingly, it enhances M.I.T.'s ability to maintain order, safety, and security on the campus. This increased control results not only from the existence of fewer opportunities for disruption, but also from the relationship between M.I.T. and the members of its community. Inherent in this relationship is the responsibility which each member has to colleagues and peers to preserve an atmosphere conducive to the orderly exchange of ideas. In addition, the awareness that they, unlike strangers, are subject to the disciplinary power of the university may deter them from engaging in disruptive activity. Strangers have no similar responsibility or deterrent.

Third, M.I.T. is neither able, nor does it seek, to isolate its community from the views of the public. By virtue of the

---

[6] For example, M.I.T. students come from every state in the United States and from 90 foreign nations; the proportion of international students at the Institute (about 18 percent) is one of the highest in an American university. The intermixing of races, ages, disciplines, and nationalities which is characteristic of M.I.T. deeply influences the life and experience of every member of this academic community. The result is an academic environment notable for its diversity of interest.

number of public ways which cross its campus, members of the M.I.T. community have ample opportunity to hear the speech and viewpoints of the public. Similarly, the public's access to members of the M.I.T. community is guaranteed since most, if not all, of M.I.T.'s students, faculty and staff must use the public ways on a daily basis.[7]

Some degree of insulation is necessary, however. As stated by the former President of the American Council of Education:

> The notion that the campus should replicate in miniature the larger community ignores the fact that a college or university is a special, rather than a general-purpose, community. Its focus is on gaining, sharing, and using knowledge. To be sure, it cannot be *isolated* from the world around it, but to function properly it must be *insulated*. Members of the academic community are not chosen at random, and the involvements of students, teachers, administrators, trustees, and others must necessarily be complementary — "unequal" if you will — for the advancement of higher learning to be accomplished (original emphasis).

L. Wilson, *Campus Freedom and Order*, 45 Denv. L.J. 502, 503 (1968).

Every university is responsible for creating an environment which permits it to effectuate its educational objectives. To

---

[7] Of a total undergraduate enrollment of 4,577 students in 1980, 54.8% lived in campus dormitories (Ashdown, Baker, Bexley, Burton, East Campus, MacGregor, McCormick, New House, Random and Senior); 29.7% lived in fraternity houses located off-campus in Boston and Cambridge; and 15.5% lived off campus. Of the total graduate enrollment of 3,547 students in 1980, 70.6% lived off campus and 29.4% lived in M.I.T. housing (Ashdown, Lang, Eastgate and Westgate). Virtually all of M.I.T.'s faculty and staff live off campus. Hence, it is necessary for almost everyone in the M.I.T. community to cross Massachusetts Avenue or other public streets to get to the main classroom complex, or to and from the campus. *See* Map at Appendix.

accomplish this, however, the university must have the freedom to determine for itself what opportunities its community has for engaging in expressive activities, and to regulate the conduct of strangers who may affect the orderliness of the university's learning atmosphere. The decision to limit or to exclude from the campus the expressive activities of strangers promotes significant academic objectives without impairing the ability of the public to communicate with the university community.

B. *Because of the Academic Use and Value of a University's Property, It has the "Right to Exclude Others."*

There is no question that the Supreme Court of New Jersey has the right to interpret its state constitution to provide greater protection for expressive activities than is accorded under the First Amendment. *See PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). However, in effectuating that right on the private property of Princeton University, the court below failed to accord sufficient weight to the university's federal property rights.

Where a university makes the academic policy decision to limit or prohibit the expressive activities of strangers on the campus, or where strangers have adequate alternative means of communication on public property, no intrusion on the university's federal property rights should be allowed. The protection accorded to a private university includes the "right to exclude" others from its campus. *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979).

In *PruneYard*, this Court upheld the right of the public to engage in expressive activities on the premises of a privately owned shopping center. The shopping center had argued that the state court's decision amounted to an unconstitutional violation of its property interests under the Fifth and Four-

teenth Amendments. In rejecting this contention, this Court found that the shopping center had "failed to demonstrate that the 'right to exclude others' [was] so essential to the use or economic value of [its] property that the state-authorized limitation of it amounted to a 'taking.'" *PruneYard*, *supra*, 447 U.S. at 84.

PruneYard is easily distinguished on its facts from the instant case. Shopping centers are unique creatures of modern society. To a large extent, they have usurped the role of traditional downtown shopping districts. A shopping center is a large commercial enterprise. The open invitation to the general public is an integral and essential aspect of its existence. It is thus understandable that a shopping center is required to accommodate the expressive activities of the public.

By contrast, use of university facilities is limited to members of the university community for the reasons and purposes set forth above, *supra* at 4-9. The value of the academic enterprise lies in its ability to provide to its community an environment conducive to the free exchange of ideas.

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting from a statement made at a conference held by the Universities of Cape Town and Witwatersrand). Where a state court intrudes on the right of an academic institution to make essential judgments about the

"atmosphere" of the campus, an unjustified "taking" occurs. It invades the sphere of autonomy reserved to all private universities to make decisions regarding fundamental academic policies.[8] This intrusion is constitutionally impermissible.

The "taking" of Princeton's property rights is particularly unjustified because adequate alternative means of communication exist. Consideration of alternative available channels of communication is essential in striking the proper balance between federal property rights and state expressive rights. If adequate alternative channels exist, the state has no basis for requiring federal property rights to yield. As this Court noted in *Lloyd Corp., Ltd.* v. *Tanner*, 407 U.S. 551, 567 (1972):

> It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

This Court traditionally has looked to the existence of alternative channels in resolving conflicts between strangers' expressive rights and employers' property rights in cases arising under the National Labor Relations Act ("NLRA"). *See NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 545 (1972).[9]

---

[8] This Court, in the past, has noted that a great deal of deference toward academic policies is appropriate. *See, e.g., Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978) (academic dismissal policies); *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978) (admissions policies).

[9] Although these cases were decided under the NLRA, the issues raised are clearly analogous to the instant case. This Court found expressive rights in

This Court's decision in *PruneYard* did not reject the value of looking at alternative channels of communication. However, in the total factual context of a very large shopping center open to the general public, it appears to have found that the available channels could not, standing alone, defeat the state's interest in the promotion of expressive activity.[10]

At trial, Princeton established that there were numerous alternative channels of communication off campus. However, the Supreme Court of New Jersey failed to give sufficient weight to Princeton's federal property rights in light of the availability of alternative channels of communication. It stated:

> [t]he owner of such private property, therefore, is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property. It is at this level of analysis — assessing the reasonableness of such restrictions — that weight may be given to whether there exist convenient and feasible alternative means to individuals to engage in substantially the same expressional activity.

Babcock & Wilcox when it stated that "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Thus, statutorily protected expressive rights had to be balanced against the private property rights of employers. In the instant case, the rights accorded by the state constitution should also be balanced and an accommodation struck without unnecessary infringement of Princeton's property rights.

[10] *See PruneYard*, *supra*, 447 U.S. at 94 (Marshall, J., concurring) ("The California Supreme Court's decision is limited to shopping centers, which are already open to the general public"); 447 U.S. at 96 (Powell, J., concurring in part) ("Significantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, free-standing stores and commercial premises. Nor does our decision today apply to all 'shopping centers'").

> While the presence of such alternatives will not eliminate the constitutional duty, it may lighten the obligations upon the private property owner to accommodate the expressional rights of others and may also serve to condition the content of any regulations governing the time, place, and manner for the exercise of such expressional rights.

Appellants' Jurisdictional Statement at 27a-28a.

By considering alternative channels of communication only for the purposes of regulating the time, place, and manner of communications by strangers, the Supreme Court of New Jersey has misconstrued the importance of such alternative channels in the balancing of interests. It is the right of the state's judiciary to determine that the common interest of the public in free expression requires that private property interests give way to some extent. However, such a determination is unwarranted where that same interest may be served without resort to so intrusive a means.

The "business" of the University is education. In pursuit of its academic objectives, a private University has a property interest in creating a forum for the exchange of ideas between members of the University community. If no alternative channels of communication were available to the public, then the state arguably could require Princeton to accommodate the speech interests of the public. But such channels were available at Princeton, as they are at M.I.T. The decision below, therefore, represents a needless public usurpation of Princeton's property rights.

Thus, it is clear that Princeton had the right to exclude or limit the expressive activities of strangers on its campus. Abridgement of this right by the Supreme Court of New Jersey constitutes an unwarranted "taking." Further, the abridgement of this right was unnecessary to achieve the avowed state purpose of enhancing speech because there were adequate alternative channels of communication.

Conclusion.

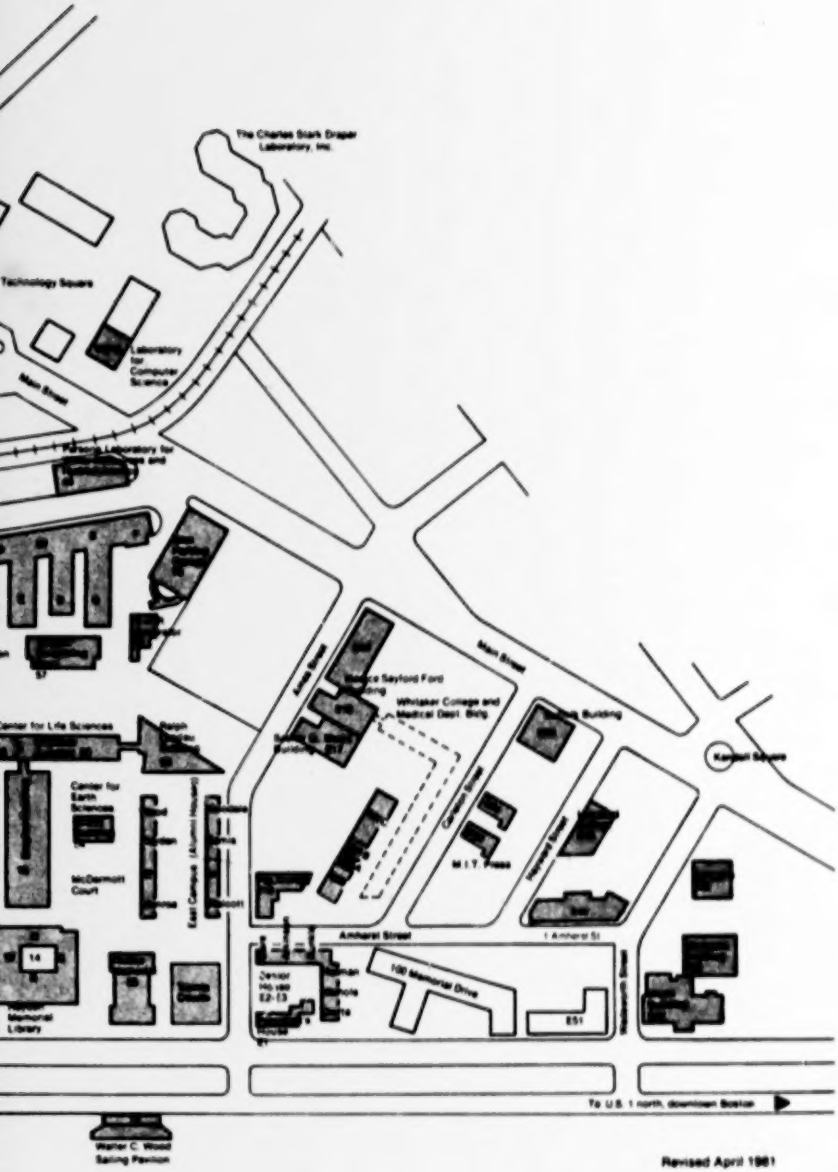
For the reasons set forth above, this Court should reverse the judgment of the court below.

Respectfully submitted,

JAMES ROOSEVELT, JR.,
Counsel of Record,
KAY H. HODGE,
HERRICK & SMITH,
100 Federal Street,
Boston, Massachusetts 02110.
(617) 357-9000
Attorneys for Amicus Curiae Massachusetts Institute of Technology

July 13, 1981.

East Campus



Revised April 1981

The numbers on this map refer to M.I.T.'s building numbers. Under this numbering system, a single room number serves to completely identify any location on the campus. In a typical room number, such as 7-111, the figure(s) preceding the hyphen give the building number; the first number following the hyphen, the floor; and the last two numbers the room. Thus Room 7-111 is in Building 7, on the first floor; Room 7-311 is directly above it, on the third floor.

It is useful to know that buildings on the main campus east of the Great Dome (Building 10) have even numbers and those west of it have odd numbers. Don't expect to find Building 6, for instance, next to Building 5.

Buildings west of Massachusetts Avenue are designated W, those north of the Conrail tracks N, those east of Ames Street E, and those north of the railroad and west of Massachusetts Avenue NW.

West Campus